IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No.

CITY OF MADISON HEIGHTS
a Michigan Municipal Corporation
Petitioner

vs.

DRAINAGE BOARD FOR THE TWELVE TOWNS DRAIN, DANIEL W. BARRY Its Chairman, DELOS HAMLIN and ROBERT V. MOORE
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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CITY OF MADISON HEIGHTS,
a Michigan Municipal Corporation,
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vs.
DRAINAGE BOARD FOR THE TWELVE TOWNS RELIEF DRAINS, DANIEL W. BARRY, Its Chairman, DELOS HAMLIN and ROBERT Y. MOORE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, the City of Madison Heights, respectfully prays that a Writ of Certiorari issue, to review a judgment of the Michigan Supreme Court entered in the above entitled cause and its Order Denying Application for Rehearing.

OPINIONS BELOW

The opinions rendered in the courts below are:

a. Judgment of Trial Judge, the Honorable William John Beer, Circuit Judge, County of Oakland (Sixth Circuit), State of Michigan, a copy of which is attached hereto as Appendix D.

b. Opinion of the Michigan Supreme Court, reported at 361 Michigan 522 (official advance sheet), a copy of which is attached hereto as Appendix C.

c. Order of Michigan Supreme Court denying Application for Rehearing, a copy of which is attached as Appendix A.

JURISDICTION

The opinion of the Michigan Supreme Court was filed December 1, 1960. Its Order Denying Application for Rehearing was dated January 9, 1961.

The jurisdiction of this Court to issue the desired Writ of Certiorari is conferred by 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Where a state Supreme (Appellate) Court, in reversing the decision of the trial court, relies exclusively upon the theory of *res judicata*, when, in fact, there has been no prior adjudication of the legal point in issue, does the action of the appellate court in directing a dismissal of the proceedings constitute a denial of due process in violation of the Fourteenth Amendment to the Constitution of the United St es?

2. Where a state Supreme (Appellate) Court, in reversing the decision of a trial court, relies exclusively upon the theory of *res judicata* and permits the imposition of a "special assessment tax" upon the taxpayers of a municipality, without regard to the benefits to be received by virtue of the proposed local improvement, and where no court theretofore has ruled upon the question of whether or not the computation of the tax thus to be assessed was consistent with the benefits to be received or proportional to the contribution of the municipality to the condition to be corrected, is the refusal of the appellate court to consider the matter on its merits, and the resultant imposition of a tax burden upon the taxpayers of the municipality, a denial of due process in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Where a state statute creates a Drainage Board and grants to that board powers which, under the interpretation of the state Supreme (Appellate) Court, vest in said board the right to impose upon a municipality and its taxpayers "special assessment taxes" for "local improvements" without consideration of benefits received or of the origin of the conditions sought to be corrected, is such stat-

ute, insofar as it permits under the guise of taxation the taking of property of the taxpayers of such municipality, violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. XIV, Sec. 1:

> "• • • nor shall any State deprive any person of life, liberty or property, without due process of law; • • •."

Michigan Statutes:

(1) Sections 468, Chapter 20, Act 40, Public Acts of 1956, as amended; C. L. Mich. 280.648; Mich. Stat. Ann. 11.1468:

> "• • • The drainage board shall then proceed to tentatively establish the percentage of the cost of such drain which is to be borne by each public corporation. *In making the apportionments hereunder, there shall be taken into consideration the benefits to accrue to each public corporation and also the extent to which each public corporation contributes to the conditions which make the drain necessary:* • • •." (Emphasis supplied.) (See full text, Appendix I(1).).

(2) Section 469, Chapter 20, Act 40, Public Acts of 1956, as amended; C. L. Mich. 280.469; Mich. Stat. Ann. 11.1469:

> "After the foregoing tentative apportionments of cost have been made, then the drainage board shall set a time and place when and where it will meet and hear any objections to such apportionments. • • •

At such hearing, any public corporation to be assessed or any taxpayer thereof shall be entitled to be heard. After such hearing, the drainage board may confirm the apportionments as tentatively made, or if in any respect it shall deem such apportionments to be inequitable, it shall readjust the same: * * *. After confirmation, the drainge board shall issue its order setting forth the several apportionments as confirmed, which order shall be known as the 'final order of apportionment'." (See full text, Appendix I(2).)

(3) Section 473, Chapter 20, Act 40, Public Acts of 1956, as amended; C. L. Mich. 280.473; Mich. Stat. Ann. 11.1473:

"After the confirmation of the apportionments by the drainage board, it shall cause to be prepared by the chairman of said board a special assessment roll assessing the estimated cost of the drain (or if the actual cost has been ascertained, then such actual cost) against the several public corporations in accordance with the confirmed apportionments. * * *." (See full text, Appendix I(3).)

(4) Section 474, Chapter 20, Act 40, Public Acts of 1956, as amended; C. L. Mich. 280.474; Mich. Stat. Ann. 11.1474:

"* * * It shall be the duty of the tax levying officials of each of the other public corporations assessed to levy sufficient taxes to pay assessment installments and interest as the same shall become due unless there shall have been set aside moneys sufficient therefor. * * *" (See full text, Appendix I(4).)

(5) Section 480, Chapter 20, Act 40, Public Acts of 1956, as amended; C. L. Mich. 280.480; Mich. Stat. Ann. 11.1480:

"The cost of any drain shall include (1) the cost of locating, establishing and constructing the drain; (2) the administrative and other expenses of the drainage board; (3) the cost of construction of bridges and culverts; (4) the cost of acquiring any lands and/or rights of way; (5) all engineering, legal and other professional fees; (6) the cost of the service and publication of all notices; (7) interest on bonds for the first year, if bonds are to be issued; and (8) an amount not exceeding 10% of the gross sum to cover contingent expenses."

(6) Section 483, Chapter 20, Act 40, Public Acts of 1956, as amended; C. L. Mich. 280.483; Mich. Stat. Ann. 11.1483:

"Neither the final order of determination nor the final order of apportionment shall be subject to attack in any court, except by proceedings in certiorari brought within 20 days after the filing of such order in the office of the chairman of the board issuing the same. If no such proceeding shall be brought within the time above prescribed, the drain shall be deemed to have been legally established and the legality of the drain and the assessments therefor shall not thereafter be questioned in any suit at law or in equity, either on jurisdictional or nonjurisdictional grounds."

STATEMENT OF THE CASE

This case raises, chiefly, a question involving the taking of property (special assessment tax dollars) without due process of law, in violation of Article XIV, United States Constitution. It is the petitioner's position that the wrongful taking is made possible by an erroneous decision of the Michigan Supreme Court, or, alternatively, by an invalid statute of the State of Michigan.

The instant case was instituted in the Circuit Court for the County of Oakland, State of Michigan, on October 9, 1959, by the filing of a Petition for Writ of Certiorari to be addressed to the respondents, the Drainage Board of the Twelve Towns Relief Drains and the members of that Board. The petitioner there, as here, was the City of Madison Heights. The Petition challenged the propriety of an apportionment of cost of a proposed drain. Of a total proposed cost of more than $47,000,000.00, something over $2,800,000.00 was allocated to the Petitioner City, to be spread, along with carrying costs, against the taxpayers of the petitioning municipality.

The Writ of Certiorari was issued. After hearing, the trial court entered a judgment on January 4, 1960 (Appendix D) by which the action of the respondent Drainage Board, insofar as it pertained to the apportionment of costs above mentioned, was quashed and set aside. From that judgment the respondents appealed to the Michigan Supreme Court.

In the trial court the respondents raised, among others, the defense of *res judicata*. In the Michigan Supreme Court the respondents (there, the Appellants) raised the same

defense. The appellate court, in a decision reported at 361 Michigan 522 (official advance sheets) adopted the respondents' argument of *res judicata* and based its opinion solely thereon. The decision of the trial court was reversed, and the action of the Drainage Board was thus allowed to stand.

On behalf of all of its taxpayers, the Petitioner contends that there has been a taking of property (tax dollars) without due process of law for the following reasons:

1. The Supreme Court of the State of Michigan has denied to the petitioner and its taxpayers the right accorded by the subject statute to a review of the apportionment of costs of the proposed drain.

2. The Supreme Court of the State of Michigan, by its decision, has allowed taxation for local improvements without regard to the benefits received.

3. If the subject statute has been correctly interpreted by the Michigan Supreme Court, the statute is invalid in that it permits the Drainage Board to spread taxes for local improvements without regard to the benefits received, and in such a manner as to wrongfully burden one municipality while benefiting another.

4. By reliance of the doctrine of *res judicata* the Michigan Supreme Court foreclosed itself from a consideration of the merits of the case although the specific question involved had not been passed upon, theretofore, by any court.

RAISING OF FEDERAL QUESTIONS SOUGHT TO BE REVIEWED

1. The Michigan Supreme Court recognized the inherent problem of "due process" in its opinion and specifically used the term in support of its opinion on page 527 of the official report of the case (361 Michigan 522).

2. The decision of the Michigan Supreme Court taken as a whole (in reversing the action of the trial court) effectively takes from the petitioning municipality and its taxpayers property (tax dollars) without due process of law.

3. The decision of the Michigan Supreme Court denied to the Petitioner and its taxpayers a specific right of review accorded by the applicable statute (*supra*, page 6); the impropriety of such denial was presented to the trial court on argument, and to the Michigan Supreme Court by the Brief of Plaintiff and Appellee (Petitioner here) and by argument before the last named court.

4. The problem of due process was presented to the Michigan Supreme Court in specific terms in the Application for Rehearing, a copy of which is attached hereto as Appendix B.

5. The impropriety of the levy of a "special assessment" for a "local improvement" without regard to the benefits to accrue to the taxpayer was alleged in Petitioner's original Petition for Writ of Certiorari (attached as Appendix E) and remained a central issue throughout the proceedings, although it was ignored by the Michigan Supreme Court in its determination.

ARGUMENT

In order that this Argument may be viewed in the proper perspective, it is deemed necessary to portray the background of the instant case, as well as a pair of antecedent cases involving the same statute and the same proposed drainage project.

Pursuant to a statute (now amended and known as Chapter 20, Act 40, Public Acts of 1956, Michigan, the pertinent portions of which are set forth above or are attached as Appendix I(1)-(4)) the Respondent, Drainage Board for the Twelve Towns Relief Drains, came into being during 1955. The statutory purpose of any such Drainage Board is to implement the construction of the intracounty drains in a specified area. The area here involved is the southeasterly portion of Oakland County (a suburban area just north of Detroit, Michigan). Originally, there were twelve municipalities involved; hence, the name of the drain.

The statute provides for hearings as to the necessity and overall practicality of the proposed drain. These were held and the question of necessity or desirability of the drains is not here in question. The statute also provides (Appendix I(1)) that the cost of the proposed drain shall be divided amongst the several benefited municipalities in proportion to the benefits each is to receive and the contribution of each to the conditions to be corrected by the proposed drain; the Drainage Board is obligated to prepare a "tentative apportionment" of the costs, hold hearings, make proper adjustments and finally enter its "final order of apportionment (Appendix I(2)). The statute also recognizes and protects the right to challenge the final appor-

tionment by means of certiorari within 20 days after the entry of the final order (*supra*, page 6).

In 1956, after it became apparent that the Drainage Board was about to hold hearings with respect to its tentative apportionment of costs, two suits were started to inhibit the holding of such hearings. These suits were instituted by the Township of Southfield and the Township of Troy, two of the twelve municipalities; they were multifaceted attacks and challenged many aspects of the statute and the actions of the Drainage Board. The trial court found in favor of the Drainage Board, filed its Opinion (Appendix G) and entered a Decree (Appendix H). The consolidated cases were appealed to the Michigan Supreme Court, and the decision of the trial court was affirmed. This latter case is reported as *Township of Southfield v. Drainage Board for Twelve Towns Relief Drains; City of Troy v. Same;* 357 Mich. 59. The full text of that decision is attached as Appendix F.

After the last-mentioned decision the Drainage Board held a hearing as to the apportionment of costs, and, in spite of objections by the present Petitioner, approved the apportionments and filed its "final order of apportionment" on October 2, 1959. Thereafter, on October 9, 1959, and within the 20 days permitted by satute, the present Petitioner filed its Petition for Writ of Certiorari, seeking to quash the apportionment. As noted above, the Petitioner was successful in the trial court, and unsuccessful in the Michigan Supreme Court.

Quite obviously, the Michigan Supreme Court, by its action in reversing the trial court, and taking from the Petitioner the relief there granted, meant to foreclose and prohibit the right of action recognized and preserved by the Statute (*supra*, page 6) which is to *follow* the final action

of the Drainage Board, because of the preliminary litigation which occurred *prior* to the adoption of the "final order of apportionment". Because of the results thus imposed, the Petitioner contends that it, as representative of all of its taxpayers, has been subjected to an unfair burden so that other municipalities could be unfairly benefited, and thus has been deprived of property (tax dollars) without due process of law (1) by an agency of the State of Michigan, i.e., the Drainage Board, and (2) by the State of Michigan through the action of its Supreme Court.

If the Drainage Board, in implementation of the powers vested in it by statute, is empowered by the statute to cause the levy of a special assessment tax without regard to the local benefits received, that statute authorizes, and the action of the Board is, clearly, a taking of property without due process.

If the Supreme Court of the State of Michigan refuses to consider the merits of a cause involving the taking of millions of tax dollars, and does so arbitrarily on the assumed basis of *res judicata,* when in fact there has been no prior adjudication of the legal point in issue, such refusal is a rather exquisite form of denial of due process.

The Petitioner conceives that the question of whether or not, in the final analysis, this Honorable Court would agree that either the action of the Drainage Board or the action of the Michigan Supreme Court constitutes a denial of due process is a matter to be discussed after the allowance of the presently sought Writ of Certiorari. However, by way of argument, Petitioner respectfully suggests that the matters hereinbefore reviewed and reflected in the various appendices attached hereto, show the following specific elements which negative the propriety of the defense of *res judicata,* to-wit:

a) The judicial review here sought concerns an action specifically preserved to the Petitioner by the statute (*supra*, page 6), which action is to be taken *after* and not before the final action of the Drainage Board. The cases upon which Respondents rely arise from matters adjudicated prior to final action by the Drainage Board. It is Petitioner's position that no such adjudication could be *res judicata* of matters which, pursuant to the terms of the statute, should be raised after the final action of the Drainage Board.

b) Petitioner alleges that at no time in the prior cases did the trial court or the Michigan Supreme Court compare the action required by the statute with the action taken by the Drainage Board. At no place in the records of those cases does any court allege nor adjudicate that the Drainage Board did, in fact, follow the statute. It is elementary that if no adjudication of the point in issue has been made, the matter cannot be *res judicata*. (Reference is made to the former trial court's Opinion, Appendix G, the former trial court's Decree, Appendix H, and the former decision of the Michigan Supreme Court, Appendix F.)

c) Petitioner also has raised, and here raises the question of whether or not it was, in fact, a party to the preceding cases. While the Petitioner admits that it asked and received leave to intervene in those cases, it denies that it did, in fact, ever intervene, and thus denies that it is a party bound by the results in the foregoing cases.

It would thus presently appear that the instant case presents: (1) a federal question involving the taking of property by a state or an agency thereof without due process of law contrary to the guarantees of the United States Con-

stitution; (2) a question of substance involving on its face over $2,800,000.00, and perhaps more than double that amount when interest to be paid is considered; and (3) a question which was decided by the Michigan Supreme Court in a manner contrary to the probable decision of this Honorable Court.

RELIEF SOUGHT

The Petitioner respectfully suggests that the requested Writ of Certiorari be issued in order that this Honorable Court may adequately review the matters here involved.

Respectfully submitted,

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Dated: Royal Oak, Michigan,
March 25, 1961.

APPENDIX A

ORDER OF MICHIGAN SUPREME COURT DENYING REHEARING

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 9th day of January in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

A motion for rehearing having been heretofore submitted herein, it is hereby Denied, with costs to defendant.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 10th day of January in the year of our Lord one thousand nine hundred and sixty-one.

/s/ Donald F. Winters,

(Seal)

Clerk.

APPENDIX B

STATE OF MICHIGAN—In the Supreme Court

Appeal from the Circuit Court for the County of Oakland

Honorable William John Beer, Circuit Judge

City of Madison Heights, a Michigan Municipal Corporation, Plaintiff and Appellee, v. Drainage Board for the Twelve Towns Relief Drains, Daniel W. Barry, Its Chairman, Delos Hamlin and Robert Y. Moore, Defendants and Appellants.	No. 48,659

APPELLEE'S APPLICATION FOR REHEARING

The plaintiff, City of Madison Heights, does hereby respectfully apply to this Honorable Court for a rehearing of the above entitled cause.

While it is obvious that the Court reviewed this case carefully and with all due consideration, the plaintiff is of the present opinion that certain aspects of the case were inadvertently overlooked or were misapprehended, and, as a result thereof, the case has been decided in accordance with the faulty principles of law and in conflict with the fundamental rights of the parties in interest. It is for these reasons a rehearing is sought.

As a part of its Application, and in support thereof, the Plaintiff submits the following Brief.

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

It is the Plaintiff's position that the decision announced by this Honorable Court is contrary to the law. It must be noted that this Court does not say in its present opinion that the Drainage Board of the Twelve Towns Relief Drains followed the law. Neither did this Court decide in the prior cases (Twp. of Southfield v. Drainage Board; Twp. of Troy v. Drainage Board, 357 Mich. 59) that the Drainage Board had followed the law. Of at least equal significance is the fact that the defendants in the present case did not contend, either in the trial court or upon appeal, that the law as to the apportionment of costs had been followed.

For all practical purposes, as the case is now situated, it may be assumed that the sole defense raised by the defendants was that of *res judicata*. Because of the defendants' arguments both the plaintiff and then the Court were bound to deal with the subject. In writing its opinion the Court adopted the argument of the defendants. The plaintiff contends that the argument was fallacious and that this Court erred in acting in pursuance thereof. There are three reasons for plaintiff's position each of which will be discussed briefly:

1. First, let us assume (and the propriety of such assumption is denied by plaintiff) that the matter in question is undeniably one which is *res judicata*. Let us further assume that the administrative action in question is diametrically opposed to the applicable law. And then, let us as-

sume that the Supreme Court itself had entered or affirmed the decree or order in question.

Is there anything in our system of jurisprudence which compels the perpetuation of an erroneous or unlawful decree? Is there any rule which prohibits the correction of an obvious error? Can it be said that the Supreme Court could not consider and correct a mistake of its own?

The answer to each question must be in the negative!

Can it then be said that an incorrect decision by a Circuit Court is more binding on the Supreme Court than one of its own decisions? Obviously not!

The defense of *res judicata* was intended to provide a means of bringing to an end useless litigation. It was never meant to provide a method of perpetuating an error which will deprive the citizens of one community of millions of special assessment tax dollars for benefits moving to other municipalities. The defense surely cannot be allowed to deprive the taxpayers of Madison Heights of approximately three million dollars plus years of interest without regard to compliance with the applicable statute. If such should be the law in Michigan, this Court, as it has demonstrated in the past, has the courage to correct the inequity. And, such a step would not be novel:

> "However this Court, among others, has gone so far as to hold that it will not invoke the doctrine of *res adjudicata* if to do so would work injustice. The propriety of such ruling cannot be questioned when one reflects upon the fact that the primary purpose for which our courts were created is to administer justice. In the case of *Wallace v. Luxmoore*, 156 Fla. 725, 24 So. 2d 302, 304, we said:
>
> " '*Stare decisis* and *res adjudicata* are perfectly sound doctrines, approved by this court, but they are governed by well-settled principles and when

> factual situations arise that would apply them to defeat justice we will apply a different rule. Social and economic complexes must compel the extension of legal formulas and the approval of new precedents when shown to be necessary to administer justice. In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be modified or discarded. Blind adherence to them gets us nowhere."
>
> Beverly Beach Prop. Inc. v. Nelson, Florida; 68 So. 2d 604; 41 A. L. R. 2d 1071.

See also *Adams v. Pearson*, 411 Illinois 431, 104 N.E. 2d 267, wherein the Court held that policies underlying the doctrine of *res judicata* were not applicable where the net result would be unsatisfactory and inequitable. In the case of *Spilker v. Hankin*, 88 App. D. C. 206, 188 F. 2d 35, it was noted that *res judicata* as the embodiment of a public policy must, at times, be weighed against competing interests, and must, on occasions, yield to other policies.

To conclude the first point, therefore, the plaintiff urges that this Court is not, cannot be, and should not be precluded from an examination of the action of the Drainage Board under the law which should govern its action, by any erroneous decision of a Circuit Court, whether or not the matter is *res judicata* in the strict sense of the word.

2. The second point to which plaintiff would direct the Court's attention is one of constitutional import. Section 16, Article II of the Michigan Constitution says, in part:

> "No person shall be * * * deprived of * * * property, without due process of law."

The Fifth Amendment to the Federal Constitution contains the identical provision, and then adds:

> "* * *; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment again states the principle.

It must be remembered that no court—not even the trial court in the former cases of *Twp. of Southfield v. Drainage Board, etc., supra*—ever determined that the Drainage Board has followed the provisions of Chapter 20 of the Drain Code of 1956, as amended. Regardless of what the trial court there may have said about a formula being "lawful", any taking of tax dollars contrary to the enabling statute is a taking "without due process of law."

The utilization of the allocation formula of the Drainage Board imposes upon the taxpayers of Madison Heights an excess burden of over $2,000,000.00 plus interest for 30 years, more or less, (see Appendix 13a-15a).

No quotation of authority is needed here to sustain the proposition that special taxes for local improvements are limited to the measure of value received. In this case the home owners and other property owners in Madison Heights are being required to pay four to five times the value of the benefit received. As was said in *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 617:

> "The requirement of due process is merely the embodiment of the English sporting idea of fair play."

When one considers the relative position and apparent potential of the several communities here involved, there seems to be little "fair play" in causing Madison Heights to pay 500% of its fair share of the cost of the proposed drains. Some other community is surely paying less than it should.

The statute here applicable does not on its face permit such an allocation of the tax load. And, if by judicial determination, it is given such a meaning, the statute is obviously unconstitutional, under the basic law of the land, for truly the taxation becomes confiscation. In *Bay City v. State Treasurer*, 23 Mich. 499, 501, Justice Cooley said:

> "To take a man's property from him under pretense of taxation, for a purpose for which taxation is not admissible; is not due process of law, but is an unlawful confiscation."

All this Court needs to do to comprehend the applicability of this quotation is to compare the action of the Drainage Board with Chapter 20 of the Drain Code of 1956 (see Brief of plaintiff and appellant, pages 11 to 30).

In the instant proceeding the City of Madison Heights seeks to protect the rights of each of its taxpayers. This is reasonable and proper. But, it would seem equally proper for the several taxpayers to challenge the imposition, spreading and collection of the tax. Each taxpayer, if required to submit to the charge imposed by the Drainage Board, will have his property confiscated for the benefit of the taxpayers of another municipality; this he may, and should resist.

As to this second point it is suggested that the Court should protect the statutory and constitutional rights of the plaintiff and its taxpayers, and test the action of the Drainage Board against the governing statute. After all, why should anyone object to such an examination if it is sincerely believed the action of the Board complies with the statute and the constitutional rights of all parties? No unwarranted reverence for *res judicata* should be permitted to separate the taxpayer from those rights granted by both statute and the State and Federal Constitutions

3. The third point to which the Court's attention is directed is one already before the Court in the Briefs, but one which has been apparently overlooked. This matter is closely related to the second proposition discussed above. This Court, in the next to last paragraph of its opinion states, "There is nothing in the statute, nor in common sense or a regard for fairness or due process, calling for two such opportunities concerning the same question, that being, here, the validity of the apportionment formula".

It is respectfully suggested that it is not "opportunity", but rather it is "adjudication" which measures due process. In our judicial system there must be—somewhere—a forum which will lay side-by-side the statutory requirement and the formula used by the Drainage Board. Someone should be willing to compare prescribed standards with those arbitrarily created by the Board. An examination of the Opinion and the Decree in the *Southfield* and *Troy* cases does not show such a comparison. The statement that the formula is "equitable and legal" begs the question. It does not in any manner indicate compliance with the Drain Code. The Trial Court, there, did not decide that the formula conformed to the statutory requirement; neither did this Court on its review of those cases.

There can be no "due process"—there can be no "fairness"— in the face of a direct violation of the law which was designed for the protection of the taxpayers. The legislature by providing for review by certiorari *after* final apportionment gave to the municipalities and their taxpayers a right to test the end result against the statute. Obviously, it becomes the duty of the courts to fulfill the function prescribed by the legislature, and to "face-up" to the real question, i.e., did the Drainage Board specifically follow the applicable law.

To date, only the Trial Court in the instant case has faced the real issue, and answered it directly. It is suggested that this Court, too, sense the unfair burden sought to be imposed upon the taxpayers of Madison Heights, and then consider, forthrightly, whether or not the Drainage Board followed the only rule which could result in lawful formula. If this is done, only one conclusion is possible—the formula of the Drainage Board is wholly illegal.

CONCLUSION

Any regard for "fair play" in a case involving public expenditures must consider the only source of funds—and this is the individual taxpayer. No system or theory that imposes a burden upon the taxpayer of Madison Heights five times as great as he should bear can be said to be "fair"; nor can it be equated to due process of law.

No court—not even the Trial Court in the former cases of *Twp. of Southfield v. Drainage Board, Etc., supra*—has pretended to say that the formula used by the Drainage Board is the required statutory formula. That Court's statement that the formula used by the Board "is both equitable and legal" (page 24, Appellants' Brief) is merely a statement of a conclusion, for which the basis is not stated. If the Trial Court had, in fact, measured the Board's formula against the statute, it would have been most logical to so state. The absence of such a foundation seems to place the Court's emphasis on the "equitable" rather than the only possible lawful basis, i.e., the Drain Code. No such statement by a Circuit Court can obligate the Supreme Court of the State of Michigan to perpetuate an error to the prejudice of innocent taxpayers.

RELIEF

The City of Madison Heights, for and on behalf of its taxpayers, requests that this Honorable Court rehear and reconsider the matter at hand, and evaluate and apply the rules of law discussed under Question 2, pages 11 to 30, of the Brief of plaintiff and appellee.

Respectfully submitted,

H. Eugene Field, Esq.,
Attorney for Plaintiff-Appellee,
253 Washington Square Building,
Royal Oak, Michigan;

Harry N. Dell,
Of Counsel,
222 Washington Square Building,
Royal Oak, Michigan.

Dated: December 14, 1960.

APPENDIX C

OPINION OF MICHIGAN SUPREME COURT

(361 Michigan 522)

STATE OF MICHIGAN—Supreme Court

City of Madison Heights, a Michigan municipal corporation,
Plaintiff and Appellee,
v.
Drainage Board for the Twelve Towns Relief Drains,
Daniel W. Barry, its Chairman,
Delos Hamlin and
Robert Y. Moore,
Defendants and Appellants.

Before the entire Bench.
Dethmers, C. J.

Background information is to be found in this Court's opinion in the combined cases of Cities of Southfield and of Troy v. Drainage Board, 357 Mich. 59. The petition for establishment of the system of relief drains, therein involved, was signed for a number of cities and townships, including the Township of Royal Oak. Since then, but during pendency of those suits, that township was reduced in size by the incorporation, out of a portion of its territory, of the City of Madison Heights, plaintiff herein. After that city's incorporation it filed petitions for leave to inter-

vene in those suits as party defendant, and orders entered accordingly. After that it filed no pleadings therein. At the opening of the trial, however, its attorney stated, in open court, that he might or might not be present at all times but that he would have no objections to the trial proceeding in his absence. On the appeal here in those cases the city attorney of plaintiff herein was listed in the appendices as one of the attorneys, and he noted his concurrence in the brief filed therein for the principal defendants.

At the conclusion of the trial court's opinion in those two cases appears language, not contained in its decrees, as follows:

> "That further notice be given the public corporations constituting the Twelve Towns System prior to the hearing of objections to the tentative apportionments, and the making of the 'final order of apportionment.'"

The trial court's decrees, however, contained the following:

> "That the tentative apportionment of cost of the Twelve Towns Relief Drains among the several public corporations, as set forth in resolution of the Drainage Board adopted on September 25, 1957, was not an abuse of the discretion lodged in the Drainage Board and that there was nothing illegal in the method used in arriving at such apportionments."

As may be gathered from that decretal provision, the drainage board, before trial and decision in those cases, had made a computation and tentative apportionment of the costs of the drain among the several units of government involved, including this plaintiff, on the basis of a definite formula. From that provision of the decrees, approving the

same, no appeals were taken nor was any question about the same raised on the appeal by any of the parties.

After our decision in those cases, because of increased cost estimates attending the delay occasioned by that litigation, the drainage board caused a new statement to be prepared computing the drain costs and apportioning the same among the several units on the basis of the same formula previously approved by the mentioned decrees. Because certain changes had occurred in the interim in municipal and highway areas affected, the percentage of the cost apportioned, in the new statement, to plaintiff was decreased from the 6.338 +% in the first tentative apportionment to 6.048+% in the latter. This new apportionment was adopted, tentatively, by the board, which set a date of hearing thereon. At that hearing plaintiff alone objected to the apportionment. Its objection was directed only to the formula used as a basis for apportionment. The board determined that the objection was not well founded and confirmed the tentative apportionment.

Plaintiff brought certiorari in circuit court. That court sustained plaintiff's contention that the formula employed by the board was invalid, particularly because, as the court found, it did not comply with statutory requirements (PA 1956, No. 40, Sec. 468 [CLS 1956, Sec. 280.468 as amended by PA 1957, No. 37, Stat. Ann. 1960 Rev. Sec. 11.1468]) that the apportionment shall be made on the basis of benefits to accrue to plaintiff and the other affected governmental units and of the extent to which plaintiff and the others contribute to the conditions making the drain necessary.

Defendant drainage board appeals here, contending, inter alia, that the decisions in Southfield and Troy are *res judicata* of the legality of the formula used by the board, which is the sole object of attack by plaintiff in this case.

Plaintiff rejects defendant's claim of *res judicata* on the ground that it was not a party to nor an intervenor in the Southfield and Troy Cases because it filed no formal pleadings therein after the court had granted it leave to intervene. The extent of plaintiff's participation in the cases, as above noted, persuade us that plaintiff must be considered to have been an intervening party. Plaintiff says that it and other units had no lawful right to intervene. There is no support for this in the holding in City of Grand Rapids v. Consumers Power Co., 216 Mich. 409, that one who is a taxpayer of a city and consumer of electricity is not, by reason of such facts, one possessed of "an interest in the litigation" brought by the city against defendant utility to enforce certain rates for electricity, such as to entitle him to intervene. Here, as appears clearly enough from plaintiff's petition to intervene, plaintiff did have an interest in the litigation, alleging that it was a matter of vital interest to it that the drainage system be constructed with all possible speed, that the health, welfare and safety of its citizens were involved because of the inadequacy of existing drains, that it would be bearing a large portion of the costs of the new drain and therefore had a direct interest in the litigation and that it wished to intervene so it might assert its rights in the suit, ostensibly, to have the drains constructed as by the defendant drainage board proposed. Its interests were thus identified with those of the defendant drainage board warranting its intervention as a party defendant, but at the same time, particularly as relates to apportionment by the board of the costs of the drain, plaintiff had an interest in which it was not represented by the board as the taxpayer was held to have been represented by the city or city attorney in City of Grand Rapids v. Consumers Power Co., supra. We hold that plaintiff could be and was an intervenor in the Southfield-Troy Cases and is bound by the decisions therein.

Plaintiff further denies defendants' claim of *res judicata* on the ground that this Court did not approve the formula here involved in our opinion and decision in Southfield-Troy. It was so approved by the trial court. Appeal might have been taken from that holding but was not. It was not reversed by this Court and, therefore, remains determinative of the issue. The statement in the trial court's opinion, not contained in its decrees, that further notice should be given to the units involved prior to holding a hearing on objections to the tentative apportionment and making it final, in no wise diminishes the effectiveness of the decretal provision upholding the legality of the apportionment formula. Hearing on the first tentative apportionment had been set before the Southfield-Troy suits but had been enjoined therein. The trial court's reference, in its opinion, to a hearing to be held on objections to the tentative apportionment no doubt was made in recognition of the fact that such hearing had been enjoined and, hence, still needed to be held and also, perhaps, of the further fact that changes might have occurred since such enjoining, as they did, in cost estimates and areas affected requiring a new computation and tentative apportionment and a hearing thereon. Nothing in this entitled plaintiff to two judicial determinations of the validity of the apportionment formula.

Plaintiff points to the provisions of CLS 1956, Sec. 280.483 (Stat. Ann. 1960 Rev. Sec. 11.1483), which reads:

> "Neither the final order of determination nor the final order of apportionment shall be subject to attack in any court, except by proceedings in certiorari brought within 20 days after the filing of such order • • •."

It urges that this language expressly permits plaintiff to bring certiorari within 20 days after the final order of ap-

portionment, which was made since the two cases were disposed of here. We do not view that language as a grant but rather as a limitation on the right to certiorari. Be that as it may, no more can be said of the statute than that it evidences a legislative intent that affected parties should have one opportunity for judicial review of the board's apportionment. There is nothing in the statute, nor in common sense or a regard for fairness or due process, calling for two such opportunities concerning the same question, that being here, the validity of the apportionment formula.

Reversed and remanded with directions to enter an order dismissing. Costs to defendants.

JUDGMENT OF SUPREME COURT

(Entered December 1, 1960)

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Oakland, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is MANIFEST ERROR, therefore, it is ordered and adjudged that the judgment of said Circuit Court for the County of Oakland be and the same is hereby reversed and vacated, and that the defendants do recover of the plaintiff their costs, to be taxed, and have execution therefor, and that the cause be remanded to the Court below for the entry of an order dismissing the cause.

APPENDIX D

STATE OF MICHIGAN—In the Circuit Court for the County of Oakland

City of Madison Heights, a Michigan Municipal Corporation,
Plaintiff,
v.
Drainage Board for the Twelve Towns Relief Drains,
Daniel W. Barry, its Chairman,
Delos Hamlin, and
Robert Y. Moore,
Defendants.
No. 47,794

JUDGMENT ON CERTIORARI

This cause having been duly brought to argument in this Court, and the return of the Drainage Board for the Twelve Towns Relief Drains and the other defendants above named having been read and studied in detail by this Court, and the arguments and briefs of counsel for the respective parties having been fully understood and considered, from all of which it appears to this Court that the record of the proceedings before the Drainage Board are devoid of any evidence, any facts or any information indicating the said Board took into consideration the statutory requirement of the evaluation of the benefits to accrue to the City of Madison Heights and the extent to which that community contributes to the condition which make the drains necessary,

and that there is thus manifest error in the record and proceedings of said defendants and in the final apportionment of the costs of the Twelve Towns Relief Drains as the same applies to the City of Madison Heights, plaintiff herein.

Now, therefore, upon motion of H. Eugene Field, attorney for the plaintiff, and Harry N. Dell, of counsel for the plaintiff,

It is ordered that the determination and decision of the Drainage Board for the Twelve Towns Relief Drains with respect to the apportionment of costs of said drains and its Final Order of Apportionment adopted and filed on the 30th day of September, 1959, insofar as the same pertains to an allocation of costs of said drains to the plaintiff, City of Madison Heights, shall be, and the same are hereby, quashed, set aside and held for naught.

William John Beer,
Circuit Judge.

Jan. 4, 1960

APPENDIX E

PETITION FOR WRIT OF CERTIORARI

The City of Madison Heights, a Michigan municipal corporation, by its attorney H. Eugene Field, respectfully represents unto this Honorable Court as follows:

I.

That the City of Madison Heights is a municipal body corporate and is one of the public corporations members of the Twelve Towns Relief Drains project established and operating pursuant to the provisions of Chapter 20 of Act 40 of the Public Acts of 1956, commonly known as the Drain Code of 1956.

II.

That the defendant, Drainage Board for the Twelve Towns Relief Drains, is the corporate body acting under the above authority and that the defendant, Daniel W. Barry, is the Drain Commissioner for Oakland County, and as such, is chairman of said Drainage Board, and that the defendants, Delos Hamlin, Chairman of the Oakland County Board of Supervisors, and Robert Y. Moore, Chairman of the Oakland County Board of Auditors, are members of the Drainage Board as required by the statutory authority cited above.

III.

That the defendants, acting as the said Drainage Board, held a public hearing pursuant to said statute on Wednesday, the 30th day of September, 1959, at 10:00 o'clock A. M. for the purpose of hearing objections to the apportionments of costs of the Twelve Towns Relief Drains. That a copy of said apportionments as submitted with the notice of hearing is attached hereto and made a part hereof as though specifically set forth in full herein and marked Exhibit "A".

IV.

That plaintiff, the City of Madison Heights, appeared at said meeting and through its Engineer, Manager and Attorney, and by authority of its legislative body, made written objections to the aforementioned apportionments of percentage of costs of said Twelve Towns Relief Drains assessed against the City of Madison Heights, and that a copy of said written objection is attached hereto and made a part hereof as though expressly set forth herein and marked Exhibit "B".

V.

That notwithstanding said objections the said Drainage Board by unanimous action of its members at the aforesaid meeting confirmed the apportionments as set out in Exhibit "A" attached hereto.

VI.

That Section 468 of Chapter 20 of the Drain Code of 1956 (being Section 11.1468 Michigan Statutes Annotated) provides, in part, as follows:

"• • • In making the apportionments hereunder, there shall be taken into consideration the benefits to accrue to each public corporation and also the extent to which each public corporation contributes to the conditions which make the drain necessary: • • •",

and Section 469 of said chapter (being Section 11.1469 of Michigan Statutes Annotated) provides in part:

"• • • At such hearing, any public corporation to be assessed or any taxpayer thereof shall be entitled to be heard. After such hearing, the drainage board may confirm the apportionments as tentatively made, or *if in any respect it shall deem such apportionments to be inequitable it shall readjust the same:* • • •." (Emphasis supplied.)

VII.

That there is no reasonable relationship between the aforementioned apportionment of cost assessed to Madison Heights and "the benefits to accrue" to Madison Heights, and that the benefits to accrue to Madison Heights are extremely small, in relationship to the benefits to accrue to other municipalities in the Twelve Towns Relief Drains project.

VIII.

That there is no reasonable relationship between the aforementioned apportionment of costs assessed to Madison Heights and the extent that Madison Heights "contributes to the conditions which make the drain necessary," and the petitioner asserts that "the conditions which make the drain necessary" have not been created by or contributed to by the City of Madison Heights, but have, in fact, been created by and contributed to by other municipality

members of the Twelve Towns Relief Drainage district and that if these conditions had not been created by and contributed to by these other municipalities there would be no need for Madison Heights participation in the Twelve Towns Relief Drainage System, and that Madison Heights participation in the Twelve Towns Relief Drainage system became necessary to alleviate conditions caused by the other municipalities in the drainage system resulting in pollution of the Red Run Drain, a large open drain traversing the City of Madison Heights.

IX.

The plaintiff further asserts that the apportionment made to the City of Madison Heights has been greatly increased by the arbitrary credits given by the Drainage Board to the participating municipalities for benefits for former drains which have been taken into the Twelve Towns Relief Drains system and which constitute approximately one-third (⅓) thereof. That said credits have been given on the basis of present estimated costs of reconstruction, of said drains, although they are largely in excess of thirty (30) years old, depreciated, in need of repairs, and the present estimated cost of reconstruction is far in excess of the actual original cost of construction; that the credit thus given bears no reasonable relationship to the benefit to accrue to said public corporations, or to the extent they contribute to the conditions which make the Twelve Towns Relief Drains necessary.

X.

That there is no reasonable relationship between the apportionment assessed against the City of Madison Heights and the distance from the outlet that the municipality is located. That the capacity of the portion of the Twelve Towns Drains system to be installed in Madison Heights greatly exceeds the capacity of a drain necessary to serve the Madison Heights area of the system, and that such size is made necessary by the conditions which municipalities (public corporations) other than Madison Heights have contributed to make the drain necessary and that the size of the proposed installation in Madison Heights bears no reasonable relationship to the benefit to accrue to Madison Heights.

XI.

That your petitioner has no other specific remedy without the aid of a Writ of Certiorari inasmuch as Section 483 of Chapter 20 of the Drain Code of 1959 (Section 11.1483 Michigan Statutes Annotated) expressly provides that the final order of apportionment shall be subject to attack only by proceedings in certiorari.

XII.

That the apportionment assessed to the City of Madison Heights and confirmed by the Drainage Board is inequitable and should be adjusted to conform to the statutory requirements for the apportionments and that the action of the Drainage Board at the aforementioned meeting in confirming the said apportionment was arbitrary, capricious and an abuse of discretion and without basis.

Wherefore, petitioner prays that this Honorable Court may issue a Writ of Certiorari to the defendant, the Drainage Board of Twelve Towns Relief Drains, to the defendants, Daniel W. Barry, its chairman, and Delos Hamlin and Robert Y. Moore, its members, commanding them and each of them to certify the records and proceedings in said matter to this court and that upon the return thereof, this court may review the action of said defendants and each of them; that this court may determine that the action of the Drainage Board is not in accordance with the statute; and that this court may determine that the action of the Drainage Board is an abuse of discretion.

City of Madison Heights, a Michigan
Municipal corporation,
By /s/ H. Eugene Field,
Its Attorney.

* * * * *

I hereby allow the issuance of a Writ of Certiorari as prayed in the within petition and direct that said Writ be served on or before the 15th day of October, 1959, and that said Writ be returnable on the 26th day of October, 1959, at 9 o'clock in the forenoon of said day.

William John Beer,
Circuit Judge.

EXHIBIT "A"

REGISTERED MAIL

August 31, 1959

To: The Member Municipalities of the Twelve Towns Relief Drains Project

Enclosed herewith please find a copy of official notice of hearing on apportionments of cost of Twelve Towns Relief Drains to be held by the Drainage Board for the Twelve Towns Relief Drains at 10:00 o'clock A. M., Eastern Standard Time on September 30, 1959, in the office of the Drainage Board for the Twelve Towns Relief Drains in the Southern Oakland County Agencies Building, No. 111 South Troy Street, Royal Oak, Michigan.

Enclosed also please find ten copies of the detailed schedule of apportionment, column six of which includes the tentative percentages of cost included in the accompanying notice of hearing.

Very truly yours,

Daniel W. Barry, Chairman, Drainage Board for The Twelve Towns Relief Drains.

DWB:mg
encl:
cc: Clerks of:

City of Berkley
City of Birmingham
City of Clawson
City of Ferndale

City of Hazel Park
City of Huntington Woods
City of Madison Heights
City of Oak Park
City of Pleasant Ridge
City of Royal Oak
City of Troy
Village of Beverly Hills
Township of Royal Oak
County of Oakland
Michigan State Highway Commissioner
Oakand County Road Commission
Irving H. Ronk

NOTICE OF HEARING

Re: Apportionments of Cost of
Twelve Towns Relief Drains

Notice is Hereby Given that the cost of the Twelve Towns Relief Drains has been tentatively apportioned as follows, to-wit:

Public Corporations	Tentative Percentages of Cost
City of Berkley	6.539930
City of Birmingham	4.231101
City of Clawson	5.168552
City of Ferndale	8.962235
City of Hazel Park	2.826107
City of Huntington Woods	2.874504
City of Madison Heights	6.048158

City of Oak Park	11.333141
City of Pleasant Ridge	.843965
City of Royal Oak	29.355762
City of Southfield (formerly a part of the Township of Southfield)	8.510564
City of Troy (formerly a part of the Township of Troy)	2.765228
Village of Beverly Hills (formerly a part of the Township of Southfield)	.772298
Township of Royal Oak	.856252
State of Michigan on account of drainage to state highways	6.777937
County of Oakland on account of drainage to County highways	1.111870
County of Oakland by reason of Miscellaneous Resolution No. 3192 of the Board of Supervisors adopted March 8, 1957	1.022396
Total	100.000000

Notice is Further Given that the Drainage Board for the Twelve Towns Relief Drains will meet at 10:00 o'clock A. M., Eastern Standard Time, on the 30th day of September, 1959, in the office of the Drainage Board for the Twelve Towns Relief Drains in the Southern Oakland County Agencies Building, No. 111 South Troy Street in the City of Royal Oak, Michigan for the purpose of hearing any objections to the said apportionments.

Notice is Further Given that the plans, specifications and estimates of cost of said Twelve Towns Relief Drains

and also a description of the area to be served thereby, are on file at said office of the Drainage Board for the Twelve Towns Relief Drains; and that the said estimated cost is $47,102,000.00.

Notice is Further Given that at said hearing any public corporation to be assessed or any taxpayer thereof, will be entitled to be heard.

This notice is given by order of the Drainage Board for the Twelve Towns Relief Drains.

Daniel W. Barry,
Chairman of the said
Drainage Board.

Dated: August 28, 1959.

APPORTIONMENT

TWELVE TOWNS RELIEF DRAINS

No. 30

APPORTIONMENT

TWELVE TOWNS RELIEF DRAINS

Public Corporation	1. Area in Acres	2. Percent of Area	3. Share of Complete Drainage System	4. Shares of Benefits of Former Drains	5. Share of Twelve Towns Relief Drains	6. Approx. Share in Percent Twelve Towns
Cities of:						
Berkley	1,622.643	6.608594	$ 4,235,459.74	$ 1,155,022.09	$ 3,080,437.65	6.539930
Birmingham	1,002.954	4.084766	2,617,933.85	625,000.63	1,992,933.22	4.231101
Clawson	1,365.766	5.562402	3,564,953.41	1,130,462.17	2,434,491.24	5.168552
Ferndale	2,401.495	9.780652	6,268,437.40	2,047,045.43	4,221 91.97	8.962235
Hazel Park	611.067	2.488714	1,595,021.26	263,868.31	1,331, .52.95	2.826107
Huntington Woods	706.212	2.876214	1,843,370.71	489,421.99	1,353,948.72	2.874504
Madison Heights	1,207.266	4.916874	3,151,233.36	302,429.76	2,848,803.60	6.048158
Oak Park	3,080.014	12.544080	8,039,523.36	2,701,387.12	5,338,136.24	11.333141
Pleasant Ridge	341.761	1.391902	892,072.49	494,548.22	397,524.27	.843965
Royal Oak	7,328.970	29.848950	19,130,245.55	5,303,094.53	13,827,151.02	29.355762
Southfield	1,810.449	7.373478	4,725,675.27	717,029.30	4,008,645.97	8.510564
Troy	562.797	2.292123	1,469 925.74	166,548.21	1,302,477.53	2.765228
Village of Beverly Hills	154.962	.631119	404,485.30	40,717.58	363,767.72	.772298
Township of Royal Oak	424.408	1.728501	1,107,799.39	704,487.58	403,311.81	.856252
Co. of Oakland—assumed by Co. a/c Zoo & Golf Course	246.730	1.004866	644,020.42	162,451.62	481,568.80	1.022396
Co. of Oakland a/c Highways	315.256	1.283954	822,888.42	299,175.22	523,713.20	1,111870
State of Mich. a/c Highways	453.876 (*) (1,370.777)	5.582811	3,578,033.57	385,489.48	3,192,544.09	6.777937
Totals	23,636.626 (24,553.527)	100.000000	$64,090,179.24	$16,988,179.24	$47,102,000.00	100.000000

(*) State share based on 6-3-1 benefit formula applied to gross less share of benefits of former drains. Expanded area = 1,370.777 acres.

EXHIBIT "B"

September 28, 1959

To the Drainage Board for the Twelve Towns Relief Drains:

The City of Madison Heights, a Michigan Municipal Corporation, does hereby object to the tentative apportionment of the costs of the Twelve Town Relief Drain charged to the City of Madison Heights.

We understand these apportionments to be as follows:

City of Madison Heights

Area in Acres	1207.266
Percent of Area	4.916874%
Share of Complete System	$3,151,233.36
Share of Benefits of Former Drain	302,429.76
Share of Twelve Town Relief Drains	2,848,803.60
Apportionment to Madison Heights	6.048158%

Section 468 of Chapter 20 of the Drain Code of 1956 recites in part as follows:

"• • • In making the apportionments hereunder, there shall be taken into consideration the benefits to accrue to each public corporation and also the extent to which each public corporation contributes to the conditions which make the drain necessary: • • •"

The tentative apportionment bears no reasonable relationship to the benefit to be derived by the area to be served in the City of Madison Heights.

The tentative apportionment apparently has been made on the basis of the costs of the entire project, divided among the acreage to be served, without any consideration being given to the needs of the area of the system within the City of Madison Heights. The proposed installation, in Madison Heights, far exceeds the capacity of a drainage system necessary to serve the City of Madison Heights area within the Twelve Towns Drain System. There seems to be no relationship between the amount of the apportionment, and the distance from the outlet that each particular municipality is located. It is submitted that the proximity of Madison Heights to the outlet of the system should be one of the factors considered in the determination of the amount of the apportionment to be charged to Madison Heights.

The engineering estimate of cost for the size of system necessary to serve the City of Madison Heights portion of the 12 Town System amounts to $1,491,695.00. Any costs chargeable to Madison Heights in excess of that amount is the result of building the system large enough to serve the needs of all the municipalities in the system, and the City of Madison Heights ought not be required to pay such excess costs.

The tentative apportionment appears to have been made after allowing certain credits to some of the participating municipalities for benefits from former drains, which will empty into the system, and which were installed many years ago at less than the amount credited. These credits appear to have been given on the basis of present reproduction costs, without depreciation factors, rather than the original costs. No credits have been given to the City of Madison Heights for trunks and connecting arms necessary to be constructed within the City in order to make

the Tewelve Towns System available to the area being charged for its installation. A conservative estimate of the costs of such trunks and connecting arms to adequately serve the area within the Twelve Towns System amounts to $526,350.00.

It is the contention of the City of Madison Heights, that the apportionment to the City for the area to be served by the Twelve Towns System should be computed on the following basis:

Total Engineering Estimate of Drainage System in Madison Heights.....		$1,491,695.00
Less Credits:		
Share of Benefits for former Drains	$302,429.76	
Estimated Cost of New Drains Necessary to serve the area in Twelve Towns	526,350.00	
Total Credits	$828,779.76	
Net Tentative Apportionment to Madison Heights		662,915.24

Respectfully submitted,

City of Madison Heights
s/d H. Eugene Field
City Attorney

HEF/mc

APPENDIX F

OPINION OF MICHIGAN SUPREME COURT

Southfield v. Drainage Board, 357 Michigan 59

Kavanagh, J. The plaintiffs township of Southfield and city of Troy filed separate bills of complaint to enjoin certain actions of the drainage board in connection with the financing, construction and assessment of the cost of the relief drains proposed to be constructed between 8-Mile road and 15-Mile road and between John R. Road and Southfield Road in Oakland County. Defendants are the Oakland County Drain Commissioner, chairman of the Oakland County Board of Auditors, and the chairman of the Oakland County Board of Supervisors, acting as the drainage board for the Twelve Towns Relief Drains. The city of Huntington Woods, the City of Oak Park, the city of Hazel Park, the city of Madison Heights, the city of Royal Oak, the city of Berkley, the city of Ferndale, the city of Southfield, the village of Westwood, and the township of Royal Oak have intervened. Each municipality is a party by virtue of an order allowing said intervention. Paul L. Adams, attorney general of the State of Michigan, intervened under his general powers and is presently a party by virtue of an order of intervention.

The 2 cases were consolidated for trial by order of the court and as combined are here on appeal. These cases involve the interpretation and application of chapter 20, PA 1956, No. 40, or the drain code, commencing with CLS 1956, Sec. 280.461 (Stat. Ann. 1957 Cum. Supp. Sec. 11.1461).

A lengthy record is presented on appeal, together with exhibits in excess of 50, giving some indication of the complexity of the problems.

The estimated cost of the relief drains involved is in the neighborhood of $44,000,000. No one disputes the matter of the drains being necessary for public health. Therefore, no discussion will be given to that particular point.

Numerous changes have taken place in the governments of the respective municipalities since the institution of these proceedings. The original petition to establish a system of relief drains was signed by the cities of Birmingham, Ferndale, Hazel Park, Huntington Woods, Oak Park, Pleasant Ridge, Royal Oak and the townships of Royal Oak and Troy. Neither the township of Southfield nor the city of Troy, nor any of the intervening parties hereto, except as above named, joined in said petition. In about 1952 preliminary investigations paid for by most of these communities were carried on. The townships of Southfield and Troy shared in the cost of this exploratory effort. However, Southfield never, by any action of its governing body, agreed to become a part of the plan which was ultimately devised. Since the filing of the petition the township of Royal Oak has been reduced in size by reason of the incorporation of the city of Madison Heights from said township territory. Since the trial Southfield has been reduced by the incorporation of the village of Westwood. Since the trial the city of Southfield has been formed out of the township of Southfield. Earlier, after the petition was filed, practically all of the township of Troy was incorporated into the city of Troy.

At a meeting of the drainage board on November 10, 1955, the board considered the petition and by resolution adopted at said meeting set December 15, 1955, as the date

of the first hearing. Determination by the drainage board was made as follows:

> "It has become necessary for the public health to supplement said existing county drains by the construction of relief drains as set forth in said petition."

The December 15, 1955, hearing was adjourned until January 17, 1956, at 10 a.m. At said hearings on both December 15, 1955 and January 17, 1956, no objections were made to the petition, to the project or to the designation of the public corporations to be assessed. The meeting of January 17, 1956, was adjourned to January 27, 1956. At the meeting on January 27, 1956, two minor changes were made in the routes of the relief drains from those set forth in the petition. No question is raised in this case with respect to said changes.

A final order of determination was made and entered by the drainage board on January 27, 1956. Neither the final order of determination nor the resolution in support thereof contains any statement or findings concerning the matter of public health. However, the minutes of the board meeting of January 27, 1956, recite that "the necessary proceedings have been taken in respect to said petition including the holding of a hearing for the purpose of receiving any objections to the proposed project." The minutes further recite that "said petition is sufficient in all respects."

On January 27, 1956, three separate engineering firms were retained to do the engineering work. Cost estimates were presented by the 3 engineering firms on August 13, 1956. The total estimated cost was $38,581,000.

On September 4, 1956, the board approved the plans and specifications and the estimates of cost aggregating $38,-

581,000 and adopted a tentative apportionment setting forth the percentage of the cost to be borne by each of the public corporations to be assessed.

At a meeting of the board on September 4, 1956, October 12, 1956, was set as the date of hearing upon apportionments. This hearing was not held, restraining orders having been issued upon the institution of these suits.

At the time of the original planning of the Twelve Towns Relief Drains no portion of the said system was to be psysically located within Southfield township. At the time the final order of determination was entered on January 27, 1956, and as late as October, 1956, when the drainage board proposed to enter its final order of apportionment, it was thought that no physical part of the system was to be constructed in Southfield township. Since the dates mentioned the board, without any new hearings or any new or amended final order of determination, extended the course of the relief-drains system into a portion of the township and increased the cost to be borne by Southfield township from $811,046.80 to $4,295,893.91.

The court in its opinion made a finding that due to the topography of Southfield township approximately the easterly 1/12 of said township can be benefited by the Twelve Towns system. About 11/12 of the entire township must drain westward into the Rouge River System.

Although it was not initially anticipated that any of the Twelve Towns system would be physically located in the plaintiff township, there were 596.336 acres of land in said township included in the drainage district, which acreage was to be served by the Twelve Towns system. Under the latest revised plans some of the physical structures of the drains will be located in the township and 1,948.714 acres of

land in said township have been included in the drainage district. This revision in plans came about apparently by testimony of witnesses that the River Rouge is now overloaded and is not in a position to take storm waters not in an area within the River Rouge basin.

The court in its opinion made a finding that the area within Southfield township now included in the Twelve Towns district has been for many years in the drain district for the Royal Oak drain, which empties into Red Run drain which discharges into the Clinton river. The court further made a finding in its opinion that it is logical, feasible and necessary for that part of Southfield township which is proposed to be a part of the Twelve Towns system to remain a part of the Clinton basin as opposed to being a part of the River Rouge basin.

The tentative apportionments of cost made on September 4, 1956 were later rescinded after changes were made in the plans and specifications by the engineers at the direction of the drainage board which would enlarge a portion of the drains and permit the inclusion of 1,352.78 acres in Southfield township, which had been previously in the Royal Oak drainage district. The acreage in the city of Troy was reduced by 370,516 acres because of the elimination of acreage in the city of Troy, which was not within one of the original drain districts, except for 2 small parcels.

The formula used to determine the apportionment of a particular municipality's share in the drainage project was as follows: Cost of the new drains plus today's value of the old existing drains, multiplied by the percentage of the area in each public corporation within the drainage system, minus the contributions by the particular municipality for

the old drains, but which contribution was appreciated in terms of today's values.

Approximately 2% of the total area of the city of Troy is in the proposed drainage district to be relieved and properties and persons in the north and northeasterly portion of the City of Troy receive no tangible or direct benefits by reason of the inclusion of the 2% area of the city of Troy in the drainage area.

Additional facts necessary to understand the questions presented are that when Royal Oak township officials signed the original petition the township consisted of the area now known as Madison Heights and the township's present area then known as the west end of the township. The city of Madison Heights came into being on December 9, 1955. Royal Oak Township has an area of 424.408 acres, all of which is in the proposed drain area. Four school districts lie partially within said township. The voted millage to be used for assessment purposes for School District No. 3 Fractional, Royal Oak, Southfield and city of Oak Park is 47.85 mills. The other 3 school districts each have a voted millage of less than the said 47.85 mills.

In the cities of Huntington Woods and Royal Oak there are located the Detroit Zoological Park and the Rackham Golf Course, which are owned and operated by the city of Detroit. These properties constitute 246.730 acres and are not subject to *ad valorem* taxation. The amount which was to be assessed on account of these properties was distributed among the several public corporations to be assessed. Upon objection, the board of supervisors of Oakland county, by resolution adopted March 8, 1957, agreed to assume and pay the cost attributable to these 2 Detroit properties.

It is contended that article 10, Sec. 21, of the Michigan Constitution of 1908, as amended in 1948, limits the total

amount of taxes assessed against property for all purposes for a period not to exceed 20 years, at 50 mills, if a majority vote should approve an increase to that limit.

The assessed valuation of Royal Oak township, as presently constituted, and at State equalized figures, is $5,477,315. No voted increase has been authorized to the constitutional tax limitation of 50 mills.

The lower court held as follows:

"1. That the petition (exhibit 1) need not have been signed by all of those included in the Twelve Towns System in order to give the board jurisdiction—only 2 or more subject to assessments being necessary.

"2. That chapter 20 of the code is constitutional and valid.

"3. That the constitutional tax limitation contained in article 10, Sec. 21 of the Michigan Constitution of 1908 has application as to the extent to which the townships may participate in the cost of said drain.

"4. That said constitutional tax limitation contained in article 10, Sec. 21 of the Michigan Constitution of 1908 does not limit the cities as to the extent to which they may participate in the cost of said drain.

"5. That the construction of the Twelve Towns drain is necessary for the public health and that the board was justified in so finding in its initial resolution.

"6. That the successive steps taken by the board were in compliance with the code."

"7. That further notice be given the public corporations constituting the Twelve Towns System

prior to the hearing of objections to the tentative apportionments, and the making of the 'final order of apportionment.'

"8. That the restraining orders heretofore issued be dissolved."

Intervening plaintiff Royal Oak Township appeals and raises 2 questions:

1. "Is the drain code (sections 473 and 475 of P. A. 1956, No. 40), insofar as it authorizes assessments of taxes by the county drainage board, without regard for debt limitation of unchartered townships, unconstitutional?"

2. "Is section 474 of the drain code an indirect attempt to flout the constitutional debt limitation of unchartered townships?"

The city of Troy and the city of Southfield appeal and raise 5 questions:

1. "Is Chapter 20 of the drain code of 1956 unconstitutional because of the provisions of section 31 of article 8 of the Michigan Constitution pertaining to metropolitan districts?"

2. "Under chapter 20, of P. A. 1956, No. 40, may a public corporation which did not authorize the signing of the required petition, and which did not sign the petition, be charged with liability for the payment of a part of the cost of the proposed drain?"

3. "Should the cities of Detroit, Royal Oak and Huntington Woods have been included in the drainage board's final order of determination as a municipality to be taxed for some portion of the drain by reason of the golf course and the zoo located partially in Huntington Woods and Royal Oak?"

4. "Is the inclusion of that portion of the service area (described in the drainage board resolution of September 25, 1957), of the Twelve Towns Relief Drains lying within the city of Troy a proper exercise of the powers of the drainage board and not contrary to law?"

5. "Under chapter 20 of P. A. 1956, No. 40, may the drainage board after the entry of its 'Final Order of Determination' change the route of the proposed drain without holding further hearings and without entering a new final order of determination?"

We think the lower court was correct in its ruling that Royal Oak township and the other townships involved in the Twelve Towns Relief Drains were bound by the 15-mill tax limitation prescribed in Article 10, Sec. 21, of the Michigan Constitution of 1908, as amended in 1948. It is not necessary for us in this case to restate the history and legal background of the 15-mill amendment as discussed by Justice Black in *Bacon v. Kent-Ottawa Metropolitan Water Authority*, 354 Mich. 159. Suffice it to say that this is another in a long line of attempts by subterfuge to circumvent the effect of the 15-mill limitation in the Constitution. It is true, as urged by defendants, that a township has been defined as a municipality for certain purposes and under Michigan law, "'as fixed by usage and recognition' when the amendment was adopted, incorporated villages, fourth-class cities, special charter cities and homerule cities were known as and commonly referred to as municipal corporations." See *Bacon v. Kent-Ottawa Metropolitan Water Authority, supra*, at pp. 171, 172. Subsequently we have added by case law charter townships and school districts. Now we are asked by defendants to add to this growing list townships themselves.

Defendants argue that the township of Royal Oak is a municipal corporation; that the statutes of the State of Michigan are its charter; and that the provisions of sections 474 and 475 of the drain code (CLS 1956, Sections 280.474, 280.575 [Stat. Ann. 1957 Cum. Supp. Sections 11.1474, 11.1475]) operate as a charter increase of the 15-mill tax limitation.

We again refer, as did Justice Black in *Bacon v. Kent-Ottawa Metropolitan Water Authority, supra,* to American Jurisprudence for a distinction between public corporations and municipal corporations. We quote, as did he (pp. 172, 173), from *37 Am. Jur.,* Municipal Corporations, Sec. 6, pp. 623, 624:

> "'All municipal corporations are public bodies created for civil or political purposes; but all civil, political, public corporations are not, in the proper use of language, municipal corporations. A municipal corporation must be distinguished, on the one hand, from other governmental bodies which although municipal are not corporations, and, on the other hand, from corporations which although public are not municipal. While the term "municipal corporation" is sometimes used, in its broader meaning, to include such public bodies as the State and each of the governmental subdivisions of the State, —such as counties, parishes, townships, hundreds, et cetera,—it ordinarily applies only to cities, villages and towns which are organized as full-fledged public corporations.'"

We conclude, as did Justice Black, that on these premises the townships involved in the Twelve Towns Relief Drains are not municipal corporations within the meaning, purpose, spirit, or intent of the 15-mill amendment.

Charter Township of Warren v. Municipal Finance Commission, 341 Mich. 607, is not authority for the position of

defendants since Warren township was a charter township. Those townships in the instant case are not. Neither are *Hall v. Ira Township*, 348 Mich. 402, or *Kent County Board of Education v. Kent County Tax Allocation Board*, 350 Mich. 327, authority or support for the position of defendants. We feel the lower court was correct in this statement of the law when he said:

> "Townships are subject to the tax limitation imposed by the Constitution of 1½% of the assessed valuation of said property."

The language of Article 10, Sec. 21, of the Constitution of 1908, as amended in 1948, is clear and unambiguous as it relates to townships. There is no case law which would be persuasive of a contrary holding. The taxing power of a township is what it may receive from the allocation of the 15-mills plus any increase voted by its electors. Any participation by the townships shall be so limited.

The second question raised by Royal Oak township is: Is section 474 of the drain code an indirect attempt to flout the constitutional tax limitation of unchartered townships, and is it as a consequence in violation thereof? Section 474 complained of reads as follows:

> "If any such public corporation shall fail or neglect to so account to the county treasurer for the amount of any such installment and interest, then the county treasurer shall advance the amount thereof from county funds and deduct the same from any moneys (other than those pledged for the payment of debts) then or thereafter payable by him to such public corporation. The board of supervisors of any county which shall have advanced any money for a public corporation and which shall not have been reimbursed therefor, may order

> such public corporation and its officers to levy upon its next tax roll an amount sufficient to make such reimbursement on or before the date when its taxes become delinquent; and it shall be the duty of such public corporation and its tax levying and collecting officials to levy and collect such taxes and to reimburse the county: Provided, That the foregoing shall not prevent the county from obtaining reimbursement by any other legal method." (C.L.S. 1956, Sec. 280.474 [Stat. Ann. 1957 Cum. Supp. Sec. 11.1474].)

It is the contention of Royal Oak township that the provisions in section 474 of the drain code are in conflict with Article 10, Sec. 23, of the State Constitution of 1908, as amended in 1954, which reads as follows:

> "On and after July 1, 1955, there shall be returned to local governmental units by the method hereinafter set forth, ½ cent of a State sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate). The State disbursing authority shall remit to counties as a whole on a population basis and payment shall be made to the county treasurer who shall remit to the respective cities, townships and villages within the county on a per capita basis."

The legislature has lately provided that the township board in its discretion may provide for the payment of a township-at-large drain assessment out of the general or contingent fund of the townships. CLS 1956, Sec. 280.263 (Stat. Ann. 1957 Cum. Supp. Sec. 11.1263).

Under chapter 20, Sec. 474, of the drain code, each public corporation is required to pay the full amount of the installment on or before the due date thereof. The section further provides for the levying of a tax sufficient to pay

each installment with interest as the same becomes due unless there shall have been set aside moneys sufficient therefor.

It is admitted that the Twelve Towns Drains is a health project. The legislature in the absence of constitutional limitations can and has provided how this drainage project will be financed. This principle is recognized and stated in 17A Am. Jur., Drains and Sewers, Sec. 64, pp. 486, 487. The general rule is also stated in 16 McQuillin, Municipal Corporations (3d ed.), Sec. 44.33, p. 96, as follows:

> "In the absence of constitutional restriction, compulsory taxation may be imposed on a municipal corporation by the legislature in all those cases wherein the municipality acts as the agency of the State government."

The general principle that the legislature has supreme power in matters affecting the public health was stated by Justice Cooley in *Sheley v. City of Detroit*, 45 Mich. 431, 432, 433, as follows:

> "The questions, then, are questions of legislative power. Whether this method of apportioning the cost of pavement or of repavement is equitable or just or politic, is in no way involved in this suit, and we should depart from our legitimate province if we were to volunteer an opinion upon it. The legislature, acting within the sphere of its powers in the making of laws, judges, and judges finally, upon all questions of policy and of equity. If the legislature declares the cost shall be collected by general levy, or on the other hand shall be levied upon abutting lots or their owners according to values, or to assessed benefits or to frontage, the determination binds us absolutely and conclusively, provided we discover no want of legislative authority."

In adopting section 474 of the drain code the legislature exercised its prerogative that moneys belonging to the township could be used for a health project. This they had a right to do. There is no question here as to the misuse of such moneys by reason of section 474 of the drain code. The only violation of Article 10, Sec. 23, of the Constitution consists in that portion of section 474 of the drain code which reads as follows:

> "and deduct the same from any moneys (other than those pledged for the payment of debts) then or thereafter payable by him to such public corporation."

This language of the drain code is in conflict with Article 10, Sec. 23, of the Constitution of 1908, as amended in 1954. The provision in this article provides, in part, that "there shall be returned to local governmental units" and further provides, in part, the county treasurer shall "remit to the respective cities, townships and villages."

The use of the word "shall" is mandatory and imperative and, when used in a command to a public official, it excludes the idea of discretion. *People v. De La Mater*, 213 Mich. 167; *Ladies of the Maccabees v. Commissioner of Insurance*, 235 Mich. 459. This provision of the drain code, being in conflict with the above constitutional direction, is void and therefore cannot authorize retention by the county treasurer.

Royal Oak township contends that section 473 of said act (CLS 1956, Sec. 280.473 [Stat. Ann. Spec. 1956 Drain Code Supp. Sec. 11.1473]) is unconstitutional in that it authorizes levy of property taxes unlimited as to rate and amount by authorizing the drainage board through its chairman to prepare a special assessment roll assessing the

estimated (or actual, if ascertained) cost of the drain against the several public corporations in accordance with the confirmed apportionments. The township also contends that section 475 of the act (CLS 1956, Sec. 280.475 [Stat. Ann. 1957 Cum. Supp. Sec. 11.1475]) is unconstitutional in that it tends to put all such tax assessments outside the constitutional tax limitation by removing the resulting indebtedness from the statutory or charter limitation.

With the exception of uncharted townships, which we have disposed of above, there is no question as to the right of the statute being read into and becoming a part of the charter of the cities involved so as to remove the resulting indebtedness from statutory or charter limitations. *School District of City of Pontiac v. City of Pontiac*, 262 Mich. 338; *City of Hazel Park v. Municipal Finance Commission*, 317 Mich. 582; *Saginaw Council v. Board of Trustees*, 321 Mich. 641.

It is further contended that chapter 20 of the drain code is unconstitutional because of the provisions of Article 8, Sec. 31, of the Michigan Constitution of 1908 pertaining to metropolitan districts, and providing for the incorporation of such districts by 2 or more cities, villages or townships for the purpose, among others, of supplying sewage disposal or drainage.

We do not think the electors, in adopting the metropolitan district amendment, intended to abolish the drain procedure, which was established by statute long before the metropolitan drainage district constitutional amendment. If the people intended to do so, they would have added a specific provision to that effect. We find no constitutional problem in this regard.

Under the drain code it is argued that public corporations which did not authorize the signing of the required petition, and did not sign the petition, cannot be charged with liability for part of the payment of the cost of the drain.

At the time of filing of the petition, it was governed by section 3 of chapter 18-A of the former drain act (CLS 1954, Sec. 278A.3 [Stat. Ann. 1952 Rev. Sec. 11.147(3)]). Said section, without change in wording was incorporated in the drain code of 1956 as section 463 of chapter 20 (CLS 1956, Sec. 280.463 [Stat. Ann. 1957 Cum. Supp. Sec. 11.1463]). The pertinent part of said section reads as follows:

> "Whenever it shall be necessary for the public health to locate, establish and construct a county drain, then a petition therefor may be filed with the county drain commissioner signed by 2 or more public corporations which will be subject to assessments to pay the cost thereof."

If the legislature had intended to require the signatures of all public corporations to be assessed it would have said so. A public health question is involved. The legislature had a right to indicate what type of drain petition could institute the procedure. We find no requirement in law that would require all municipalities to join in the original petition in order to start the action. As long as they have had notice and an opportunity to be heard prior to assessment, legal requirements have been met. We believe they are met under this statute.

Another question raised is whether or not the county of Oakland had a right to assume the apportionment on account of the zoo and golf course properties, which are owned and operated by the city of Detroit and located in the cities of Huntington Woods and Royal Oak.

City of Detroit v. Oakland County, 353 Mich. 609, held that both said zoo and golf course are owned by the city of Detroit and used for governmental purposes, and, therefore, said properties are not subject to a special assessment for drains.

Section 468, chapter 20 of the drain code (CLS 1956, Sec. 280.468, [Stat. Ann. Spec. 1956 Drain Code Supp. Sec. 11.1468]), provides, in part, as follows:

> "Nothing herein contained shall prohibit the county from assuming any additional cost of said drain if 2/3 of the members-elect of the county board of supervisors shall vote in favor thereof."

Counties are authorized by statute to contribute to the operation of public parks and public zoological gardens. The zoo and golf course are within the terms of the definition of a public park. A large portion of the population of Oakland county either use or have available for their use if they desire both the golf course and the park. The operation of these has been held a governmental purpose. The legislature was within its rights in providing the means by which the county might assume such additional cost.

A question has been raised as to whether or not assessments can be made against the city of Troy in view of the fact that only a small portion of the city lies within the drainage area of the Twelve Towns Relief Drains.

The city of Troy as a unit is responsible for the health of the entire city and each part thereof. Contaminations and diseases do not respect lot lines or even city border lines.

Mr. Justice Long in *Davock v. Moore*, 105 Mich. 120, 132, 133 (28 LRA 783) makes the following statement:

> "The care of the public health is a police power. The several States of the Union possess a general police power, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general health, comfort, and prosperity of the State. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficut it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. They belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi Suprema lex;*' and they are to be attained and provided for by such appropriate means as the legislature may devise."

We believe the whole city is concerned with the health of its citizens and that the apportionment of these assessments to the entire city is proper under the circumstances.

The legislature had full power to require a county to pay from its general fund any deficiency accruing on drainage bonds. In the proper exercise of its plenary power, the legislature directed one unit of county government to use its funds in the aid of another unit. It does not operate as a grant of credit in violation of Article 10, Sec. 12, of the Constitution of 1908. *Oakland County Drain Commissioner v. City of Royal Oak*, 306 Mich. 124.

The final question raised is: May the drainage board after the entry of its final order of determination change the route of the proposed drain without holding further hearings and without entering a new final order of determination?

While the letter of the drain code was not followed in this respect, it would appear from the findings of fact made by the lower court that the township of Southfield and the city of Troy were unable to produce testimony that would convince the lower court that they had in any way been prejudiced or damaged. It would appear, therefore, that nothing could be accomplished by any new hearing. Therefore, we find no basis exists to hold that a rehearing should be held under the circumstances.

The matter will be referred back to the circuit court for the entry of a decree in accordance with this opinion. A public question and public corporations being involved, no costs are allowed.

Dethmers, C. J., and Carr, Kelly, Smith, Black, Edwards, and Voelker, J.J., concurred.

APPENDIX G

EXTRACT COPY OF OPINION OF TRIAL COURT

STATE OF MICHIGAN—In the Circuit Circuit for the County of Oakland, In Chancery:

Township of Southfield, et al.,
Plaintiffs,

v.

Ralph H. Main, Oakland County Drain Commissioner, et al.,
Defendants.

• • • • •

Question: Was the Method used by the Drainage Board in Determining its Tentative Allocation of Costs, Legal?

The Court says "Yes".

All the territory in the Twelve Towns Drainage District will be served by the existing drains and the proposed relief drains. Each of the engineers testified that the relief drains were designed so as to supplement the original drains in order to afford equal drainage facilities to all parts of the area for a ten-year frequency storm. Therefore, after the construction of the Twelve Towns relief drains, each municipality will have equal drainage facilities as far as the county drains are concerned. The drains were designed as an area project and without respect to municipal boundary lines. The necessity and wisdom of solving the drainage problem here involved on an *area*

level as opposed to Township or City levels was amply demonstrated.

Exhibit 7 is based upon the theory that to furnish adequate drainage facilities to this area, there must be a system (including the original and the relief drains) with certain capacities, which is represented by the $61,093,452.85 figure in column 3; that the several political subdivisions have already furnished toward that total system, the original drains which are represented by the respective dollar amounts in column 4, totalling $17,001,452.85 (on a 1956 cost basis); and that therefore by subtracting from each public corporation's total requirements, that which it has already furnished, leaves the amount which it should pay for the relief drains. The plaintiffs object to the deductions for the old drains. Let us assume two public corporations with the same service area, where one provided more of the original drains. Would it be in accordance with benefits, if both were assessed the same amount for the relief drains where its need for relief was not as great because of its former larger contributions? Depreciation has no part in the formula. The original drainage districts and not the Twelve Towns area will have to maintain the original drains.

By way of emphasis the following basic facts should be repeated.

1. Credits were granted only for existing county drains which have been paid for, and in some cases are still being paid for, by the citizens of the municipalities in which such county drains are located.
2. The Twelve Towns Drainage System is designed to serve all of the communities within its service

area. To do this, both the existing county drains *and* the proposed relief drains are necessary.

From these two basic premises, it must follow that if credits were not given for existing county drains the residents of relatively less developed communities with few existing county drains, such as Troy and Southfield, would receive the benefit of the existing county drains without paying for them, even though the residents of the communities in which such county drains are located have paid and still are paying for them. This being the case, it cannot be said that there has been an abuse of discretion, or that the approach used by the Drainage Board was an unreasonable one. The fact that there may be other possible ways of making the apportionment is immaterial, since the court will not substitute its judgment for that of the members of the Drainage Board.

The Court concludes that the method or formula used by the Board in determining its tentative allocation of cost (Exhibit 7) is both equitable and legal.

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APPENDIX H

EXTRACT COPY OF DECREE OF TRIAL COURT

STATE OF MICHIGAN—In the Circuit Court for the County of Oakland, in Chancery:

Township of Southfield, et al.,
Plaintiffs,
v.
Ralph H. Main, Oakland County Drain Commissioner, et al.,
Defendants.

* * * * *

Therefore, it is ordered adjudged and decreed as follows:

1. That the Twelve Towns Relief Drains are necessary for the public health, the same having been determined by the Drainage Board, which determination is conclusive upon the Court in the absence of fraud or abuse of discretion, * * *

* * * * *

14. That the tentative apportionment of cost of the Twelve Towns Relief Drains among the several public corporations, as set forth in the resolution of the Drainage Board adopted on September 25, 1957, was not an abuse of the discretion lodged in the Drainage Board and that there was nothing illegal in the method used in arriving at such apportionments.

* * * * *

APPENDIX I

STATUTORY PROVISIONS

(All are sections of Chapter 20, Act 40, Public Acts of 1956, as amended; C. L. Mich. 1948, 280.468 et seq.)

(1) Sec. 468. "The drainage board shall proceed to secure from a competent engineer, plans, specifications and an estimate of cost of the proposed drain, which, when adopted by said board, shall be filed with the chairman thereof. In approving the route of the drain, the drainage board shall not be limited to that described in the petition. The drainage board shall then proceed to tentatively establish the percentage of the cost of such drain which is to be borne by each public corporation. In making the apportionments hereunder, there shall be taken into consideration the benefits to accrue to each public corporation and also the extent to which each public corporation contributes to the conditions which make the drain necessary: Provided, That apportionments against the state shall be based solely upon the drainage of state highways, and those against the county shall be based solely upon the drainage of its county highways. Before any tentative apportionment shall hereafter be made, the drainage board shall designate the area to be served by the drain project, which may or may not include all of the area in any public corporation to be assessed. Nothing herein contained shall prohibit the county from assuming any additional cost of said

drain if 2/3 of the members-elect of the county board of supervisors shall vote in favor thereof."

(2) Sec. 469. "After the foregoing tentative apportionments of cost have been made, then the drainage board shall set a time and place when and where it will meet and hear any objections to such apportionments. Notice of such hearing shall be published twice in the county by inserting the same in at least 1 newspaper published therein, designated by the drainage board, the first publication to be not less than 20 days prior to the time of hearing. Such notice shall also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that any notice to the state shall be sent to the state highway commissioner and any notice to the county shall be sent both to the county clerk and the county road commission, if any, which mailing shall be made not less than 20 days prior to the time of hearing. Such notice shall be signed by the chairman and proof of the publication and mailing thereof shall be filed in his office. The drainage board may provide a form to be substantially followed in the giving of such notice. The notice shall include tentative apportionments to the several public corporations. At such hearing, any public corporation to be assessed or any taxpayer thereof shall be entitled to be heard. After such hearing, the drainage board may confirm the apportionments as tentatively made, or if in any respect it shall deem such apportionments to be inequitable, it shall readjust the same: Provided, That if such readjustment shall involve the increasing of any assessment and such increase shall not be consented to by resolution of the governing body of the public corporation whose assessment was increased, then before any re-

adjusted apportionments shall be confirmed the drainage board shall set a time and place for a rehearing and shall give notice thereof as in the first instance, which notice shall also set forth the apportionments as readjusted. After confirmation, the drainage board shall issue its order setting forth the several apportionments as confirmed, which order shall be known as the 'final order of apportionment'."

(3) Sec. 473. "After the confirmation of the apportionments by the drainage board, it shall cause to be prepared by the chairman of said board a special assessment roll assessing the estimated cost of the drain (or if the actual cost has been ascertained then such actual cost) against the several public corporations in accordance with the confirmed apportionments. The drainage board may provide for the payment of such assessments in any number of annual installments, not exceeding 30, but no installment shall be less than 40% of any subsequent installment. Installments of assessments shall become due and payable on or before April first of each year. The drainage board shall fix the amount of interest, not exceeding 6% to be paid upon unpaid installments, which interest shall become due annually on the day and month upon which the annual installments become due. The drainage board may provide for the payment of any installments in advance of their respective due dates and may prescribe the terms and conditions thereof. The drainage board shall fix the time or times for the payment of the first installment so that each public corporation can make a tax levy for the payment thereof."

(4) Sec. 474. "The special assessment roll shall contain the name of each public corporation assessed, the

total estimated cost of the project (or actual cost if the same has been ascertained at the time of the preparation of the roll), the percentage apportioned to each public corporation, the amount of the assessment against each public corporation based upon the said percentage of apportionment, and the amount of each installment if the assessment is divided into annual installments. After the said special assessment roll has been prepared, it shall be presented to the drainage board for approval. When such roll shall have been approved, than a statement to that effect, signed by the chairman of the drainage board, shall be affixed to said roll setting forth the date of such approval. The chairman of the drainage board shall then certify to each public corporation assessed the amount of the total assessment against it, the amount of the various installments if such assessment is divided into installments, the due date of each installment and the rate of interest upon installments from time to time unpaid. The chairman shall also each year, at least 30 days prior to the time of the levying of taxes by each public corporation, notify it of the amount of the installment and interest next becoming due: Provided, That the failure to so notify any public corporation shall not excuse it from making payment of such installment and interest. On or before the due date of any installment, each public corporation shall pay to the county treasurer the full amount thereof, together with interest accruing to such due date. If any such public corporation shall fail or neglect to so account to the county treasurer for the amount of any such installment and interest, then the county treasurer shall advance the amount thereof from county funds and deduct the same from any

moneys (other than those pledged for the payment of debts) then or thereafter payable by him to such public corporation. The board of supervisors of any county which shall have advanced any money for a public corporation and which shall not have been reimbursed therefor, may order such public corporation and its officers to levy upon its next tax roll an amount sufficient to make such reimbursement on or before the date when its taxes become delinquent; and it shall be the duty of such public corporation and its tax levying and collecting officials to levy and collect such taxes and to reimburse the county: Provided, That the foregoing shall not prevent the county from obtaining reimbursement by any other legal method. Assessments against the state shall be certified to the state highway commissioner and paid from state highway funds. It shall be the duty of the tax levying officials of each of the other public corporations assessed to levy sufficient taxes to pay assessment installments and interest as the same shall become due unless there shall have been set aside moneys sufficient therefor. Any city may elect to spread such tax levy upon the county tax roll instead of the city tax roll. If a special assessment roll shall be prepared upon the basis of the estimated cost of the project, then after the actual cost has been ascertained and determined by the drainage board, the special assessments and the installments thereof shall be corrected by adding any deficiency or deducting any excess. The drainage board may order such corrections to be made upon the original roll or may order that a new corrected roll or a supplemental roll be prepared and submitted for approval by the drainage board."

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the United States

TWELVE TOWNS

IN OPPOSI-
APPLICATION
OF CERTIORARI

REUBEN E. MAYNARD,
Corporation Counsel—Oakland County,
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Pontiac, Michigan.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 855

CITY OF MADISON HEIGHTS,
a Michigan Municipal Corporation,
Petitioner,

vs.

DRAINAGE BOARD FOR THE TWELVE TOWNS RELIEF DRAINS, DANIEL W. BARRY, Its Chairman, DELOS HAMLIN and ROBERT Y. MOORE,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

JURISDICTION

28 U.S.C.A. Sec. 1257 (3) does not confer jurisdiction upon this court in this case. This question will be discussed under the heading "Argument."

QUESTIONS PRESENTED FOR REVIEW

On page 3 of the printed petition are set forth three questions, each of which is based upon a fals premise.

Question No. 1 is based upon the false premise that there was no prior adjudication of the legality of the apportionment of cost. The Michigan Supreme Court held otherwise. See *Madison Heights v. Drainage Board*, 361 Mich. 522, 526, where the court said:

> "Plaintiff further denies defendants' claim of *res judicata* on the ground that this court did not approve the formula here involved in our opinion and decision in *Southfield-Troy*. It was so approved by the trial court. Appeal might have been taken from the holding but was not. It was not reversed by this court and, therefore, remains determinative of the issue."

Question No. 2 is based upon the false premise that the state court in relying exclusively upon the theory of *res judicata*, permits the imposition of a special assessment tax upon taxpayers without regard to the benefits to be received and also upon the false premise that there has been no court ruling upon the question of the computation of the tax as it relates to benefits and contributions. See "Argument".

Question No. 3 is based upon the false premise that the state statute as interpreted by the state court vests in the drainage board the right to impose special assessment taxes without consideration of benefits received or the origin of the condition sought to be corrected.

Petitioner's statement of the questions presented for review do not contain a single Federal question.

STATEMENT OF THE CASE

In order to understand the legal questions involved it is necessary to make a brief resumé of the facts, supplementing the statement set forth by the petitioner.

The proceedings in the "Twelve Towns Relief Drains" project were begun by the filing of a petition therefor on October 26, 1955, executed by nine of the twelve municipalities then involved, including the Township of Royal Oak from which the City of Madison Heights was later carved by incorporation. The authority for these proceedings is Chapter 20 of Act No. 40, Public Acts of 1956 (M.S.A. Supp. 11.1001 *et seq.*), which is a re-enactment without material change, of Chapter 18-A of Act No. 316, Public Acts of 1923. The act authorizes the apportionment of the cost of these relief drains to the several public corporations at large.

The proceedings advanced to the point of a hearing on the apportionment of cost (~~$38,581.00~~ $38,581,0). Just prior to the hearing, two chancery suits were begun in the Oakland County Circuit Court in Chancery by the Township (now City) of Southfield and by the City of Troy against the drainage board for the project, restraining the holding of the hearing on apportionments. These cases were tried together in December, 1957. The decision of the Circuit Court was in favor of the drainage board and a decree was entered in each case on August 18, 1958. The pertinent provisions of the Circuit Court opinion are found in petitioner's Appendix G. Among other things the court said:

> "The court concludes that the method or formula used by the board in determining its tentative allocation of cost (Exhibit 7) is both equitable and legal."

The decrees in the lower court each contained the following statement:

> "That the tentative apportionment of cost of the Twelve Towns Relief Drains among the several public corporations, as set forth in the resolution of the Drainage Board adopted on September 25, 1957, was not an abuse of the discretion lodged in the Drainage Board and that there was nothing illegal in the method used in arriving at such apportionments." (Petitioner's Appendix H.)

The Cities of Southfield and Troy appealed from parts of said decrees but not from the above mentioned portion thereof sustaining the apportionments. The State Supreme Court decided in favor of the drainage board except as to one point not material here. See *Township of Southfield and City of Troy v. Drainage Board*, 357 Mich. 59. (Petitioner's Appendix F)

After the decision in the Supreme Court in the *Southfield* and *Troy* cases the drainage board secured a new estimate of cost which was $47,102,000 owing to increases in construction costs during the delay. The new apportionment was based upon the formula which is found on page 43 of the pending petition in this court. This formula is the same as the formula contained in Exhibit 7 in the *Southfield* and *Troy* cases. The change in the percentage apportionments are the result of the application of the formula to the increased cost and to certain area changes which had occurred in the interim in the municipal and highway areas affected. Madison Heights' percentage was decreased. *Madison Heights v. Drainage Board*, 361 Mich. 522, 524-5. A hearing on the new apportionment of cost was held on September 30, 1959 at which the tentative apportionments set forth on pages 40 and 41 of the pend-

ing petition were confirmed. Thereafter the City of Madison Heights filed its petition in the Oakland Circuit Court for a writ of certiorari. (Petitioner's Appendix E)

The drainage board answered the petition and included in its answer a motion to quash the writ upon the grounds (1) that the proceedings of the drainage board showed that it had acted legally in all matters and (2) that the cause of action was barred by the prior decrees in the *Southfield* and *Troy* cases. The answer of the drainage board including motion to quash is appended hereto as Appendix 1.

The decision of the lower court was in favor of the City of Madison Heights and the drainage board appealed. The State Supreme Court reversed the judgment of the lower court. It based its decision upon the defense of *res judicata*. Both in the Circuit and Supreme Court the City of Madison Heights claimed that it did not actually intervene in the *Southfield* and *Troy* cases. The State Supreme Court held against the city in this respect. 361 Mich. 525, 526. Attached hereto as Appendix 2, is a copy of Madison Heights' petition for intervention in those cases.

RAISING OF FEDERAL QUESTIONS SOUGHT TO BE REVIEWED

1. Nowhere in the pleadings or briefs in either the Circuit Court or State Supreme Court, prior to the brief for rehearing in the Supreme Court, is there any mention or reference to the due process clause of the Federal Constitution. Petitioner claims that a Federal question was raised when the State Supreme Court in its decision incidentally used the term "due process" in the following sentence:

> "There is nothing in the statute, nor in common sense or a regard for fairness or due process, calling for two such opportunities concerning the same question, that being, here, the validity of the apportionment formula." 361 Mich. 527.

In *Black v. Cutter Laboratories*, 351 U. S. 292, 297, the court said:

> "This court, however, reviews judgments, not statements in opinions."

2. Petitioner's bare statement 2 that the decision of the State Supreme Court deprives it of its property without due process of law, points out no Federal jurisdiction. It is the wail of every defeated litigant.

3. The statute mentioned in petitioner's paragraph 3 was construed by the State Supreme Court as a limitation and not as a grant. 361 Mich. 527. This court is bound by that decision.

4. The petitioner refers to its application for rehearing in the Supreme Court as its basis here for a claim that a Federal question is involved. Due process is not mentioned in the rehearing application. It is mentioned in paragraph numbered 2 of its brief for rehearing but no authority is cited in support thereof except the general statement that due process involves fair play. The raising of the question of due process in the state court on a motion for rehearing is not sufficient. See "Argument."

5. Petitioner now contends that the general statement in its petition for writ of certiorari in the county court, in respect to the relationship of assessments and benefits, raised a Federal constitutional question in the state courts. If that were true, why is it that the briefs in behalf of the City of Madison Heights in the Michigan Supreme Court

did not mention the constitutional question? The city makes no claim that it argued any Federal constitutional question prior to the filing of its brief for rehearing in the State Supreme Court.

ARGUMENT

Petitioner on pages 12 and 13 of its Application under the heading "Argument" alleges that it has been deprived of its constitutional rights in three respects designated as a, b and c.

(a) The state court interpreted M.S.A. Supp. Section 11.1483 as a limitation and not a grant. That interpretation of the statute by the state court is binding upon this court. In any event after the hearing on apportionments there was no new question to be litigated. As stated by the state court on page 525, "Its objection (at the hearing) was directly only to the formula used as a basis for apportionment." The formula had already been litigated. No unlitigated question was therefore raised and subject to review by the court.

(b) Petitioner says that *res judicata* is not applicable because there was no prior determination by any court that the drainage board did in fact follow the statute. The record shows otherwise. The opinion of the trial court in the *Southfield* case says:

> "The court concludes that the method or formula used by the board in determining its tentative allocation of cost (Exhibit 7) is both equitable and legal." (Petitioner's Appendix G, p. 68.)

In paragraph 14 of the decree in the *Southfield* case (Petitioner's Appendix H, p. 69) the trial court decreed "that

there was nothing illegal in the method used in arriving at such apportionments." In paragraph 18 of the same decree (Appendix 1, p. 23) the trial court decreed "that the various proceedings which have been taken in respect to the construction and financing of the Twelve Towns Relief Drains have been in compliance with Chapter 20 of the Drain Code of 1956 and are legal." The same provisions were in paragraphs 13 and 17 of the decrees in the *Troy* case.

(c) Whether petitioner was a party in the *Southfield* and *Troy* cases has been decided by the state court and is binding upon this court. 361 Mich. 526.

It is significant that petitioner cites no court decisions to support its arguments.

I.

Alleged Federal Constitutional Question Not Timely Raised

No claim is made by the petitioner that the due process clause of the Federal Constitution was discussed in its briefs prior to the time of filing a petition for rehearing. The rule is laid down by this court in *American Surety Company v. Baldwin*, 287 U. S. 156, 163-4, as follows:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering

> judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment."

The above case is cited in *Radio Station WOW v. Johnson*, 326 U. S. 120, 128, where the same rule is followed.

The present case does not come within the exception where the Federal claim arises from the unanticipated disposition of the case at the close of the proceedings in the State Supreme Court. The State Supreme Court decision was not based on any ground which was not fully discussed in the briefs presented in that court. There is no element of "unanticipated disposition" by the state court in this case.

Hulbert v. Chicago, 202 U. S. 275, involved a special assessment proceeding. At the hearing on the confirmation of the assessment roll plaintiff filed written objections including his contention that the proceedings were in violation of the Fourteenth Amendment of the Federal Constitution. This claim, however, was not made in the state court proceedings which followed. The court on page 280 said:

> "We do not think that the plaintiff in error complied with section 709 of the Revised Statutes in setting up a right under the Constitution of the United States. The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the Supreme Court, was not sufficient."

II.

Res Judicata Is Not a Federal Question

The State Supreme Court decided this case solely upon the question of *res judicata*, and held:

(1) That the City of Madison Heights intervened in the *Southfield* and *Troy* cases and was bound by the decrees therein. 361 Mich. 525-6.

(2) That the trial court in the *Southfield* and *Troy* cases approved the formula involved in this case, that appeal might have been taken from that holding but was not; and that the holding of the trial court in those cases was determinative of the issue. 361 Mich. 526.

The decrees in the *Southfield* and *Troy* cases were exactly in accordance with Madison Heights' desires as set forth in its petition to intervene (Appendix 2) in those cases. See comments of state court 361 Mich. 526. Under those circumstances, the city did not and could not claim that those cases involved any element of fraud, collusion or violation of constitutional rights. The state court therefore had before it in the present case the pure unadulterated doctrine of *res judicata*, which is a matter of state law.

The determination of a State Supreme Court is final as to whether a former judgment is or is not *res judicata*.

Union & Planters' Bank v. Memphis, 189 U. S. 71, 75;

Covington v. First National Bank, 198 U. S. 100, 109;

Wright v. Georgia RR & Banking Company, 216 U. S. 420, 429;

Oklahoma Packing Company v. Oklahoma G & E Company, 309 U. S. 4, 8;
Kersh Lake Drainage District v. Johnson, 309 U. S. 485, 489.

Kersh Lake Drainage District v. Johnson, 309 U. S. 485, involved drain bonds. In 1931 and 1932 state court decrees were entered in favor of certain landholders determining that the lien upon their lands had been satisfied by payment in full of their special assessments. Later, pursuant to a Federal Court decree, the drainage district levied a deficiency assessment against the entire district, payment of which was refused by the landowners above mentioned. The drainage district then started proceedings in the state court to enforce the assessments. These landowners pleaded *res judicata* on account of the former state court decrees freeing their lands from further assessment. The State Supreme Court sustained the *res judicata* pleas. On appeal this court said on page 489:

> "As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the state law, to render the 1931 and 1932 decrees is 'acknowledged,' and this determination by the state's highest court is binding upon us."

The state court having decided the case solely upon the question of *res judicata*, there can be no Federal question to be decided by this court upon appeal therefrom.

III.

The Due Process Clause is Not Violated by An Erroneous State Court Decision on a State Matter

Petitioner's position seems to be that it is deprived of due process because the State Supreme Court disagreed with it. An erroneous state court decision upon a matter of state law does not confer jurisdiction upon this court by virtue of the due process clause of the Constitution.

Arrowsmith v. Harmoning, 118 U. S. 194, 195-6;
Iowa Central Railway Company v. State of Iowa, 160 U. S. 389, 393-4;
Standard Oil Co. v. Missouri, 224 U. S. 270, 290;
McDonald v. Oregon R.R. & Navigation Co., 233 U. S. 665, 669-70;
American Railway Express v. Kentucky, 273 U. S. 269, 273.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

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APPENDIX 1

RETURN TO WRIT OF CERTIORARI, ANSWER TO PETITION THEREFOR, AND MOTION TO QUASH

(Filed October 26, 1959)

Now come the Drainage Board for Twelve Towns Relief Drains, and Daniel W. Barry (Chairman), Delos Hamlin and Robert Y. Moore, members of said Board, defendants in the above entitled cause, and for return to the writ of certiorari heretofore issued in this cause herewith file the proceedings taken by said Drainage Board in respect to the Twelve Towns Relief Drains; and for answer to the petition for writ of certiorari heretofore filed in this cause, say as follows:

I.

Defendants admit the allegations contained in paragraph I of said petition.

II.

Defendants admit the allegations contained in paragraph II of said petition.

III.

Defendants admit the allegations contained in paragraph III of said petition except they deny that plaintiff's Exhibit A attached to its petition was anything other than a computation upon which the apportionments of costs were based and is not a part of the official proceedings of the drainage board.

IV.

Defendants admit the allegations contained in paragraph IV of said petition.

V.

Defendants answering paragraph V of said petition admit that the drainage board did on September 30, 1959, by unanimous action, confirm the tentative apportionments made on August 28, 1959, which confirmation was made by resolution duly adopted at said meeting but which did not contain any part of plaintiff's Exhibit A except the last column.

VI.

Defendants admit the allegations contained in paragraph VI of said petition.

VII.

Defendants deny the allegations contained in paragraph VII of said petition.

VIII.

Defendants answering the allegations contained in paragraph VIII of said petition allege that the conditions which make the Twelve Towns Relief Drains necessary have been contributed to by all of the public corporations to be assessed for the cost of said project, including the City of Madison Heights, and that the Twelve Towns Relief Drains will service an area as described in a certain resolution adopted by the Drainage Board on August 20, 1959, which area includes the lands within the drainage districts of the original drains to be relieved by said Twelve Towns Relief Drains, plus certain additional territory specifically requested by certain public corporations. Defendants deny

any allegations in said paragraph VIII which are not herein admitted.

IX.

Defendants answering paragraph IX of said petition deny the allegations contained in said paragraph except to the extent they are hereinafter admitted. They admit that credits were given to each of the municipalities including the City of Madison Heights for contributions made to the county drains to be relieved by the Twelve Towns Relief Drains. They deny that the plaintiff can now raise any question as to matter of such credits for the reasons hereinafter set forth.

X.

Defendants deny the the allegations contained in paragraph X of said petition and deny that distance from the outlet is a proper basis upon which to make an assessment under the circumstances of this case. The defendants allege that plaintiff is one of fourteen public corporations which lies within the Twelve Towns Drainage Area and that each is benefited by the project and contributes to the conditions making necessary the project, in accordance with their respective areas. They allege that that part of the Twelve Town Relief Drains within the City of Madison Heights is part of a complete system for the entire area and that Madison Heights is assessed for its part of the complete system and not for the portion within the city limits.

XI.

Defendants answering paragraph XI of said petition admit that the plaintiff has no other specific remedy except

in certiorari proceedings but denies that it is entitled to any relief herein.

XII.

Defendants deny the allegations contained in paragraph XII of said petition and allege that all proceedings taken by the said Drainage Board have been in accordance with law.

XIII.

Defendants deny that plaintiff is entitled to any of the relief claimed in its petition.

XIV.

Defendants hereby move to quash the said Writ of Certiorari and all proceedings in this cause, for the following reasons:

(1) The proceedings of the Drainage Board for the Twelve Towns Relief Drains shows that the defendants have acted legally in all matters and that the plaintiff is not entitled to any relief.

(2) That plaintiff's cause of action is barred by a prior judgment inasmuch as the matters concerning which plaintiff claims relief are res judicata for the following reasons:

A. That the City of Madison Heights voluntarily intervened as a defendant in the case of Township of Southfield v. Ralph A. Main, et al., acting as the Drainage Board for the Twelve Towns Relief Drains, No. C-28669 in the Circuit Court for the County of Oakland in Chancery, and in the case of City of Troy v. Ralph A. Main, et al., acting as the Drainage Board for the Twelve Towns Relief Drains, No. C-28671 in

the Circuit Court for the County of Oakland in Chancery, which cases were appealed to the Supreme Court of the State of Michigan where an opinion was filed and recorded in Volume 357 of Michigan Reports, page 59.

B. That paragraph 16 of the original Bill of Complaint filed in said Township of Southfield case and paragraph 12 of the supplemental Bill of Complaint filed in said case read as follows:

"16. Plaintiff further shows that the defendants, acting as the Drainage Board, have wrongfully computed credits to be granted to some or all of the affected communities, whereby deductions are made for such communities because of presently existing drains; that defendants purport to be operating under some equitable formula. Plaintiff shows that even if all other acts of the defendants are proper and lawful, the statute under which they purport to act authorizes no such credit, and that until the method of ascertaining the amount to be charged to each municipality is corrected, no final apportionment should be made."

"12. Plaintiff alleges that it correctly appears on the face of the minutes of the Drainage Board for September 25, 1957, that municipalities benefiting from the proposed drainage system have not been charged with the proportion of the total cost arising from the benefits to be received and the contribution made to the drainage problem by said communities respectively. Plaintiff shows that by reason of the improper grant of credits for existing drains there is no way of ascertaining what portion, if any, of the cost to any community arises because of benefits to be received by that community and no way

of ascertaining what contribution said community is deemed to make to the overall drainage problem; plaintiff shows that it would appear by a reasonable inspection of the problem that those areas presently having the most drains should be charged proportionately more than those areas having the least drains inasmuch as the former are obviously the ones contributing most to the problem at hand."

C. That paragraph XI of the original Bill of Complaint filed in said City of Troy case and paragraph VI of the supplemental Bill of Complaint filed in said case, reads as follows:

"XI. That plaintiff has been informed (Exhibit A) that credits to various public corporations to be assessed have been established, totaling $17,100,000.00, approximately, and that said credits are for existing drains built during the last thirty years, and that said existing drains will not become a part of the so-called Twelve Towns Relief Drain System and that said credit was computed at present day estimated replacement value with no depreciation being taken into account and despite the fact, admitted by defendants, that said figure is in excess of three times the original cost thereof; that the records of the defendant Board contain no information substantiating or explaining how said credit was computed; that the drain code of 1956 contains no provision for allowing such credits and that Section 463 of said code (M.S.A. 11.1463) reads in pertinent part as follows: 'County drains * * * may be established * * * where the cost thereof is to be assessed wholly against public corporations.'

And that Section 478 of said code (M.S.A. 11.1478) in pertinent part reads as follows: 'The drainage Board * * *. It shall be responsible for the operation and maintenance of the drain.'

That the plain effect and proper statutory intent of such sections is that the Twelve Town Drain System must either consist, (1) solely of the new relief drain contemplated the whole cost of which, without credits, must be borne by the participating public corporations, or, (2) of the old existing drains plus the new relief drains, the former at some valuation other than present replacement value and made an integral part of the system and maintained by the system.

That this Honorable Court ought to so interpret and declare."

"VI. That in paragraph XI of the plaintiff's original bill of complaint the allegation is contained with respect to the credits which the Twelve Towns Drainage Board for the Twelve Towns Relief Drain proposes to award to the various municipalities and objections are therein made to the allowance of credit; that at the meeting of the Drainage Board for the Twelve Towns Relief Drain held on September 25, 1957, a resolution was made and passed establishing new credits and distributing said credits among the various participating municipalities, which credits total a sum of $17,001,452.85; that Section 480 of the Act defines what items of cost are to be taken into account in establishing, contstructing, and financing said drains and that said Section does not permit the giving of any credits to any municipality on account of any pre-existing drains;

that reference to said Section 480 of the Drainage Code of 1956 is hereby prayed, and this Honorable Court's attention respectfully called to the contents of such paragraph, for the purpose of interpretation and declaration."

D. That the opinion of the Trial Court in said Township of Southfield and City of Troy cases (which were consolidated for trial) contains the following statements:

"The formula used to determine the apportionment of a particular municipality's share in the drainage project was as follows:

Cost of the new drains plus today's value of the old existing drains, multiplied by the percentage of the area in each public corporation within the drainage system, minus the contributions by the particular municipality for the old drains, but which contribution was appreciated in terms of today's values."

(See 357 Michigan, 68, for same statement by the Supreme Court.)

"Question. Was the method used by the Drainage Board in determining its tentative allocation of costs legal?

The Court says 'Yes'.

All the territory in the Twelve Towns Drainage District will be served by the existing drains and the proposed relief drains. Each of the engineers testified that the relief drains were designed so as to supplement the original drains in order to afford equal drainage facilities to all parts of the area for a ten-year frequency storm. Therefore, after the construction of the Twelve Towns relief drains, each

municipality will have equal drainage facilities as far as the county drains are concerned. The drains were designed as an area project and without respect to municipal boundary lines. The necessity and wisdom of solving the drainage problem here involved on an *area level* as opposed to Township or city levels was amply demonstrated.

Exhibit 7 is based upon the theory that to furnish adequate drainage facilities to this area, there must be a system (including the original and the relief drains) with certain capacities, which is represented by the $61,093,452.85 figure in column 3; that the several political subdivisions have already furnished toward that total system, the original drains which are represented by the respective dollar amounts in column 4, totalling $17,001,452.85 (on a 1956 cost basis); and that therefore by subtracting from each public corporation's total requirements, that which it has already furnished, leaves the amount which it should pay for the relief drains. The plaintiffs object to the deductions for the old drains. Let us assume two public corporations with the same service area, where one provided more of the original drains. Would it be in accordance with benefits, if both were assessed the same amount for the relief drains where its need for relief was not as great because of its former larger contributions? Depreciation has no part in the formula. The original drainage districts and not the Twelve Towns area will have to maintain the original drains.

By way of emphasis the following basic facts should be repeated.

1. Credits were granted only for existing county drains which have been paid for, and in some cases are still being paid for, by the citizens of the municipalities in which such county drains are located.

2. The Twelve Towns Drainage System is designed to serve all of the communities within its service area. To do this, both the existing county drains *and* the proposed relief drains are necessary.

From these two basic premises, it must follow that if credits were not given for existing county drains the residents of relatively less developed communities with few existing county drains, such as Troy and Southfield, would receive the benefit of the existing county drains without paying for them, even though the residents of the communities in which such county drains are located have paid and still are paying for them. This being the case, it cannot be said that there has been an abuse of discretion, or that the approach used by the Drainage Board was an unreasonable one. The fact that there may be other possible ways of making the apportionment is immaterial, since the court will not substitute its judgment for that of the members of the Drainage Board.

The Court concludes that the method or formula used by the Board in determining its tentative allocation of cost (Exhibit 7) is both equitable and legal."

E. That the decree entered in the circuit court in the Township of Southfield case contains the following adjudications:

"14. That the tentative apportionment of cost of the Twelve Towns Relief Drains among the several public corporations, as set forth in resolution of the Drainage Board adopted on September 25, 1957, was not an abuse of the discretion lodged in the Drainage Board and that there was nothing illegal in the method used in arriving at such apportionments.

18. That the various proceedings which have been taken in respect to the construction and financing of the Twelve Towns Relief Drains have been in compliance with Chapter 20 of the Drain Code of 1956 and are legal."

That the same adjudications were made in paragraphs 13 and 17 of the Decree in the Circuit Court in the City of Troy case.

F. That the Circuit Court decrees in said Township of Southfield and City of Troy cases insofar as they relate to apportionments, were based upon Exhibit 7 introduced in evidence in those cases, which exhibit was a computation by which the apportionments of cost were arrived at; that Exhibit A attached to plaintiff's petition in this cause is computed upon the same formula as said Exhibit 7; and that the changes in said Exhibit A are the result of the increased estimated cost of the project and changes in the areas assigned to certain public corporations.

G. That the fundamental principles in respect to the apportionments which were confirmed by the defendant Drainage Board on September 30, 1959, were the same as those involved in the apportionments in the litigation in the former cases above referred to.

H. That the City of Madison Heights as intervening defendant in the said two former cases offered no evidence questioning the formula used in arriving at the apportionments involved therein and made no objection to the entry of the respective decrees therein, and that therefore the said City is now barred from raising any issue in this cause affecting its apportionment of the cost of Twelve Towns Relief Drains, which apportionment is percentage-wise less than the former apportionment against it and is dollar-wise larger solely because of the increase estimated cost of the project.

This Motion is based upon the records and files in this cause and in the City of Southfield and City of Troy cases above referred to, and the affidavit of Daniel W. Barry hereto attached.

Drainage Board for the Twelve Towns
Relief Drains,
Daniel W. Barry,
Delos Hamlin,
Robert Y. Moore,
By Daniel W. Barry,
Chairman of said drainage Board.

Norman R. Barnard,
Corporation Counsel,
Charles A. Davis,
Robert P. Allen,
Assistants Corporation Counsel,
Attorneys for Defendants.

By Robert P. Allen,
Claude H. Stevens,
Of Counsel,
800 First National Bank Bldg.,
Detroit 26, Michigan.

State of Michigan,
County of Oakland—ss.

Daniel W. Barry being first duly sworn deposes and says that he is one of the defendants in the above entitled cause, and that he has read the foregoing Answer and Motion to Quash and knows that contents thereof and that the same are true of his own knowledge except as to matters therein stated to be on information and belief and as to such matters he believes the same to be true.

Deponent further says that he has compared quoted statements made in the above Motion to Quash with the official records in the two cases therein referred to and that the same are true and correct excerpts from said official records.

Deponent further says that Exhibit 7 hereto attached is a true and complete copy of Exhibit 7 introduced in evidence at the trial of the Township of Southfield and City of Troy cases referred to in the foregoing Motion to Quash.

Further deponent sayeth not.

Daniel W. Barry.

Subscribed and sworn to before me, a notary public in and for the County of Oakland and State of Michigan, this 26th day of October, A. D., 1959.

Alice Treadwell,
Notary Public, Oakland County, Michigan.
My commission expires: September 25, 1960.

No. 28

EXHIBIT 7

TWELVE TOWNS RELIEF DRAINS

Public Corporation	1. Area in Acres	2. Percent of Area	3. Share of Twelve Towns System	4. Share of Benefits of Former Drains	5. Share of Twelve Towns Relief Drains	6. Approx. Share in Percent 12 Towns
Cities of:						
Berkley	1,595.204	6.745888	4,121,295.91	1,131,236.65	2,990,059.26	6.781410
Birmingham	1,020.488	4.315497	2,636,486.13	632,561.83	2,003,924.30	4.544870
Clawson	1,364.050	5.768371	3,524,097.02	1,125,806.89	2,398,290.13	5.439286
Ferndale	2,382.630	10.075799	6,155,653.51	2,034,739.98	4,120,913.53	9.346171
Hazel Park	626.809	2.650685	1,619,394.99	263,868.31	1,355,526.68	3.074314
Huntington Woods	694.580	2.937279	1,794,485.16	478,898.73	1,315,586.43	2.983730
Madison Heights	1,198.802	5.069561	3,097,169.86	302,429.76	2,794,740.10	6.338429
Oak Park	3,067.896	12.973691	7,926,075.79	2,689,202.24	5,236,873.55	11.877151
Pleasant Ridge	341.761	1.445258	882,958.01	494,548.22	388,409.79	.880908
Royal Oak	7,266.118	30.727368	18,772,410.08	5,230,998.28	13,541,411.80	30.711720
Southfield C. or T. (*)	1,948.714	8.240831	5,034,608.20	738,714.29	4,295,893.91	9.743024
Troy	546.664	2.311763	1,412,335.84	165,191.21	1,247,144.63	2.828506
Townships of:						
Royal Oak	424.408	1.794760	1,096,480.85	704,487.58	391,993.27	.889035
Troy	15.774	.066706	40,753.00	2,920.12	37,832.88	.085804
Co. of Oakland—assumed by County a/c Zoo and Golf Course	246.730	1.043386	637,440.53	162,451.62	474,988.91	1.077268
Co. of Oakland—a/c Highways	465.001	1.966422	1,201,355.10	457,907.66	743,447	1.686128
State of Mich.—a/c Highways	441.428	1.866735	1,140,452.87	385,489.48	754,963.39	1.712246
Totals	23,647.057	100.000000	61,093,452.85	17,001,452.85	44,092,000.00	100.000000

Dated: September 23, 1957

Computed by Ashton J. Berst
Checked by Charles H. Harmon

(*) Southfield divided as follows if

APPENDIX 2

PETITION FOR LEAVE TO INTERVENE AS PARTY DEFENDANT

(Filed in Troy Case November 21, 1956)

In Re City of Troy, Plaintiff vs. The Drainage Board for the Twelve Towns Relief Drains, Defendants.

Now comes the City of Madison Heights, a Municipal Corporation of the State of Michigan, and respectfully shows unto this Honorable Court as follows:

1. That it is a Michigan Municipal Corporation, located in the County of Oakland and State of Michigan.

2. That it is interested in the issues involved in this suit in the manner hereinafter set forth.

3. That it is a member of the drainage system known as the Twelve Towns Relief Drains, and it is a matter of vital interest to petitioner that said drainage system be constructed with all possible speed.

4. That the health, welfare and safety of the citizens of the City of Madison Heights have been repeatedly threatened and endangered by flood conditions existing at times of heavy rainfalls; that said flood conditions are due to the inadequacy of the existing drains within said drainage district; that your petitioner believes and alleges on information and belief, that the creation of the Drainage Board for the Twelve Towns Relief Drains, and the subsequent construction of the proposed relief drains, will alleviate said flood conditions.

5. That this suit threatens to prevent or hinder and delay the construction of the said relief drains.

6. That under the preliminary apportionment of costs of the Twelve Towns Relief Drains, your petitioner would bear a large portion of the costs of construction of said relief drains.

7. That petitioner desires to intervene in said cause as a party defendant therein in order that it may assert its rights in said suit and hereby consents that said intervention shall be in subordination to and in recognition of the propriety of the main proceedings.

Petitioner therefore prays that on the hearing of this Petition, it be granted the following relief:

(a) That an Order be made granting leave to petitioner to intervene in said cause upon such terms as shall be prescribed by the Court.

(b) That petitioner may have such other and further relief as the nature of its case may require.

City of Madison Heights, a
Municipal Corporation,
By Harry H. Young,
City Attorney.

Dated: November 20, 1956.
(Verification)